BILL C-7: THE YOUTH CRIMINAL JUSTICE ACT

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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-7: THE YOUTH CRIMINAL JUSTICE ACT

BACKGROUND

Bill C-7, the Youth Criminal Justice Act (YCJA), was introduced in the House of Commons on 5 February 2001 by the Honourable Anne McLellan, Minister of Justice. The bill is similar to Bills C-3 and C-68 of the 36th Parliament. However, Bill C-7 contains a number of changes which respond to some of the criticisms of Bill C-3, such as:

- fine tuning the Bill's Declaration of Principle to ensure an emphasis on rehabilitation and the needs of the young person;
- greater flexibility for the provinces in the presumptive application of adult sentences to persons under 16;
- clarifying the 'harmonization' principle in youth sentencing;
- greater flexibility in custodial sentencing; and
- narrowing the basis for admitting youth statements obtained in breach of certain statutory protections.

Bill C-7 would repeal and replace the *Young Offenders Act* (YOA), adopted by Parliament in 1982, in force since 1984, and amended in 1986, 1992, and 1995. (This Act had itself replaced the 1908 *Juvenile Delinquents Act*.[1]) Bill C-7 was developed and based upon *A Strategy for the Renewal of Youth Justice*, released by the government in May 1998 as its response to *Renewing Youth Justice*, the April 1997 Report of the House of Commons Standing Committee on Justice and Legal Affairs.

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(1) For a more detailed review of the *Young Offenders Act* and its evolution, see: Philip Rosen, *The Young Offenders Act*, Current Issue Review 86-13, Parliamentary Research Branch, Library of Parliament.

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DESCRIPTION AND ANALYSIS

A. Preamble, Definitions and Principles

1. Preamble

The bill includes a Preamble setting out the context within which Parliament is legislating, including a description of the broad social issues it is addressing and the legislative goals it expects to achieve. In recent years, Parliament has more frequently had recourse to preambles and other similar legislative techniques to indicate to government institutions, the courts and Canadians how it expects its legislation to be interpreted and applied. Similar goals are pursued by the use of legislative statements of purposes, principles, objectives, and factors to be considered. This bill uses these legislative techniques in several different contexts.

The Preamble contains five declarations or assertions that aim to put the rest of the bill into a policy context. The first Preamble statement holds that the community shares a responsibility to deal with the developmental needs of young persons and to guide them into adulthood. The second statement asserts that communities, families, parents and others should adopt multi-disciplinary approaches to prevent youth crime by dealing with its underlying causes, responding to the needs of young persons, and providing guidance and support to those at risk of criminal offending.

The third Preamble statements declares that information about youth justice, youth crime and the effectiveness of measures taken to address it should be available to the public.

The fourth Preamble statement recalls that Canada is a party to the *United Nations Convention on the Rights of the Child* and recognizes that young persons, in addition to the constitutional protections available to all Canadians, have special guarantees of their rights and freedoms.

Finally, the Preamble states that the youth criminal justice system must command respect, foster responsibility, and ensure accountability through meaningful consequences and effective rehabilitation and reintegration. The system is to reserve its most serious interventions for the most serious crimes, and to reduce the present over-reliance on incarceration for non-violent young persons..

Although the YOA contains a Declaration of Principle in section 3, it does not include a Preamble as such.

2. Definitions (Clause 2)

Clause 2 of the bill contains a number of definitions essential to the application of the proposed law. Many key terms and their definitions – particularly those that relate to the scope of application of the statute – are the same as in the YOA; for example, the definitions of the terms "child," "young person," and "adult," would continue to restrict the application the Act to persons between the ages of twelve and eighteen years. Also, the term "offence" would continue to mean an offence created by an Act of Parliament or by a regulation, rule, order, by-law, or ordinance of an Act of Parliament, other than an ordinance of the Yukon Territory or Northwest Territories. Clause 2 would amend this definition only to add a reference to offences created by the new Nunavut Legislature to those that would be excluded from the meaning of "offence" under the Act. As under the current YOA, young persons who committed provincial or territorial offences would have to be dealt with under applicable provincial or territorial legislation.

Clause 2 would also add some new definitions of terms arising from other proposed changes to the legislation. For example, the term "presumptive offence" would refer to offences for which an adult sentence is presumed to be appropriate, namely: certain offences of violence when committed by a young person who is at least 14 years of age – or some higher age, between age 14 and 16, designated by the province under clause 61. These offences would include the four offences currently set out in the presumptive transfer provision of section 16(1.01) of the YOA; that is, first or second degree murder, attempted murder, manslaughter, and aggravated sexual assault. To this list would be added any serious violent offence for which an adult could be sentenced to a term of imprisonment in excess of two years if, prior to the commission of that offence, at least two different judicial determinations had been made that the young person had committed a serious violent offence. Clause 2 would also add the new term "serious violent offence" (an offence in the commission of which a young person causes or attempts to cause serious bodily harm).

Finally, some of the current terms used and defined in the legislation would be altered. The term "alternative measures" would be replaced by "extrajudicial measures," although the definition would remain the same. This is also the case for the term "disposition," which would be replaced with the term "youth sentence," highlighting that, while the

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consequences may not be the same, young offenders are, like adults, being held accountable under the law for their offending behaviour. The term "ordinary court" and its definition would be eliminated from the Act; this would follow the proposed elimination of the provisions for the transfer of certain young offender cases to the adult criminal justice system. In their place, Bill C-3 would give youth justice courts (the proposed new title for "youth court") access to adult sentences in certain circumstances.

3. Declaration of Principle (Clause 3)

Clause 3 of the bill sets out in general terms Parliament's legislative intention in enacting Bill C-3. Unlike the Preamble, the Declaration of Principle enunciated in clause 3 would be contained within the body of the legislation, thus giving it more interpretative weight in enunciating the values to be respected in the administration and application of the proposed law.

Clause 3(1) contains four interlinked and ranked statements of principle. The first asserts that the youth criminal justice system is intended to promote the long-term protection of the public by preventing crime, rehabilitating young offenders so as to reintegrate them into the community, and ensuring there are meaningful consequences to offences committed. The second set of principles would establish that the youth criminal justice system is to be separate from that of adults and must emphasize rehabilitation and reintegration, fair and proportionate accountability, enhanced procedural protection, timely intervention that reinforces the link between offending behaviour and its consequences, **and a promptness and speed in dealing with such cases given young persons' perception of time.**

The third set of principles would establish that, within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should: reinforce respect for community values; encourage repair of harm done to victims and the community; be meaningful for the young person, given his or her needs and level of development; respect gender, ethnic, cultural and linguistic differences; and respond to the needs of young persons with special requirements. The final set of principles would establish that special considerations apply in respect of proceedings against young persons; more specifically: that young persons have rights and freedoms in their own right; that victims should be treated with courtesy, compassion, and respect; that victims should be provided with information; and

that parents should be kept informed and encouraged to support their children in addressing their offending behaviour.

Many of these same principles can be found in section 3(1) of the YOA, except that the new Declaration of Principle in clause 3(1) of the bill attempts to organize the principles into appropriate themes and provides for some sort of hierarchy within each theme.

Overall, the proposed new Declaration of Principle appears to reflect a shift away from considerations, such as society's denunciation of offending behaviour, and the short-term protection of the public from specific offenders, that tend to favour custodial dispositions for young offenders. In general, the new Declaration of Principle proposed in clause 3(1) of the bill is consistent with the recommendations of the House of Commons Justice and Legal Affairs Committee in its 1997 report.[2]

The other major difference from the current Declaration of Principle in the YOA would be the addition in clause 3(1)(d) of references to the needs, interests and role of victims in the youth justice system.

Like section 3(2) of the current Act, clause 3(2) of the bill would require that the legislation be "liberally construed" in accordance with the Declaration of Principle.

B. Part 1: Extrajudicial Measures

1. Introduction

Part 1 of Bill C-3 deals with "extrajudicial measures," the proposed new term for what are currently known as "alternative measures" under the YOA, whereby young persons can be held accountable for their offending behaviour without proceeding with a formal charge through the courts. Out-of-court responses, such as police warnings, cautioning, referral to community programs, apologies to victims, acknowledgement and reparation of damage, and community service work, are seen as providing more meaningful consequences for much youth crime, as well as being faster and less costly than interventions through the formal court system. Moreover, providing for such non-judicial alternatives is in keeping with Canada's obligations under the United Nations *Convention on the Rights of the Child* (see article 40(3)(b) of the

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(2) House of Commons, Standing Committee on Justice and Legal Affairs, Thirteenth Report, *Renewing Youth Justice*, 2nd Session, 35th Parliament, April 1997, p. 12 and 15.

Convention). Recent studies have shown that, in comparison with countries such as the United States, the United Kingdom, Australia, and New Zealand, Canada has been under-utilizing such measures and has thus tended to divert fewer youth crime cases from the formal court system.(3)

Part 1 of the bill seeks to address a recommendation of the 1997 House of Commons Justice Committee report for reform of the youth justice system to accommodate various alternatives to court proceedings.(4) The provinces would, however, retain considerable flexibility with respect to the specific details of the various extrajudicial measures and the extent to which they would implement them.

While the YOA currently makes provision for alternatives to formal court proceedings, it provides little guidance as to their precise nature, when they are likely to be most appropriate, who should decide on their use, and what they should aim to achieve. Bill C-3 seeks to fill this gap by providing a more detailed and structured framework for the use of these non-judicial measures. Under alternative measures in the present legislation, some act, such as community service work, is performed in consideration for which a charge is withdrawn by the prosecution. Bill C-3 would expressly incorporate less formal responses – such as police warnings, cautioning, and referral to community programs – which could be applied even more quickly, without any charge being laid. Some of these informal alternatives have always been available to police; however, there is some evidence that the exercise of police discretion in deciding not to lay charges has declined in recent years.(5) Bill C-3 would confer statutory recognition on these less formal non-judicial responses to youth offending behaviour, oblige police to consider their suitability in each case, and would create a presumption of their suitability with respect to non-violent first offenders.

2. Principles and Objectives

Part 1 of the bill first sets out a series of principles and objectives which are intended to animate and inform the thinking of those involved in the design and application of extrajudicial measures (primarily, provincial justice ministries, police and prosecutors). Clause 4

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(3) Department of Justice, "Fact Sheet: Youth Justice Statistics," Ottawa, March 1999; Department of Justice, *A Strategy for the Renewal of Youth Justice: Legislative and Supporting Program Components*, Ottawa, 12 May 1998; and *Renewing Youth Justice*, Chapter 6.

(4) *Renewing Youth Justice*, p. 55 (Recommendation 7).

(5) *Ibid*, p. 45.

declares that the following principles would be applicable to this Part of the bill, in addition to those set out in the overall Declaration of Principle for the bill in clause 3(1):

- extrajudicial measures are often the most appropriate and effective way to address youth crime;
- extrajudicial measures allow for effective and timely interventions focusing on the correction of offending behaviour;
- in the case of a non-violent offender with no previous convictions, extrajudicial measures are to be presumed to be adequate to hold the young person accountable for his or her actions; and
- extrajudicial measures should be used whenever they are sufficient to hold the young person accountable for offending behaviour, notwithstanding that the young person may have committed previous offences.

Clause 5 sets out objectives for extrajudicial measures; they should:

- provide an effective and timely non-judicial response to offending behaviour;
- encourage young persons to acknowledge and repair the harm caused to the victim and the community;
- encourage families of young persons to be involved in the design and implementation of the measures;
- provide an opportunity for victim participation in decisions on the measures selected and to receive reparation; and
- respect the rights and freedoms of young persons and be proportionate to the seriousness of the offence.

3. Warnings, Cautions and Referrals

The bill proposes two broad categories of extrajudicial measures: warnings, cautions, and referrals to community-based programs, for less serious cases; and "extrajudicial sanctions," for more serious cases.

Clause 6(1) of the bill would require police first to consider, in light of the principles set out in clause 4 (above), the appropriateness of a warning, caution (if available – see below), or program referral, before proceeding with a formal charge or with extrajudicial

sanctions. Failure to follow clause 6(1) would not, however, invalidate any charge laid against the young person (clause 6(2)).

The availability of cautioning by police or prosecutors as an extrajudicial measure would depend on having such programs established by the provincial and federal attorneys general pursuant to clauses 7 and 8. Unlike a mere "warning" given immediately by police on the spot or at the young person's home, a "caution" would generally take place later at a police station or prosecutor's office and might involve an apology by the offender to the victim. However, the bill does not indicate any specific meaning for "warning" or "caution," or the distinction between them.

Under clause 9, evidence that any offence had been dealt with by way of a warning, caution, or referral, or evidence that police had taken no further action in respect of an offence, would not be admissible as proof of prior offending behaviour by a young person in any youth justice court proceedings with respect to that young person. This restriction would relate primarily to sentencing hearings for any subsequent offences.

4. Extrajudicial Sanctions

Where a warning, caution, or referral was not thought adequate to deal with a young person (because of the seriousness of the offence, the nature and number of previous offences, or any other aggravating factor), recourse could be had to extrajudicial sanctions (clause 10(1)). Extrajudicial sanctions would correspond to the current model of "alternative measures" under the YOA. They would represent a more serious and formal response than the other extrajudicial measures. As under the current legislation, extrajudicial sanctions would operate like a conditional discharge, but without any adjudication of guilt. Provided the young person fulfilled certain conditions – such as reparation of damage caused to the victim or community service work – the criminal charge would be withdrawn or dismissed.

As with the other extrajudicial measures, the bill is silent as to the precise nature of the sanctions envisioned. These details would be left to the provinces. The bill would, however, continue to stipulate conditions and restrictions on the use and effect of extrajudicial sanctions. These would be the same as those currently applicable to alternative measures under the YOA (see: YOA, section 4; and Bill C-7, clauses 10(2) to 10(6)):

- an extrajudicial sanction must be part of a program of sanctions authorized by the Attorney General or persons designated by the lieutenant governor in council of the province;

- an extrajudicial sanction must be an appropriate response, with regard to the needs of the young person and the interests of society;
- the young person must fully and freely consent to be subject to the extrajudicial sanction;
- before consenting to an extrajudicial sanction, a young person must be advised of his or her right to legal representation and be given the opportunity to consult counsel;
- the young person must first accept responsibility for the act or omission that forms the basis of the offence;
- there must be, in the opinion of the prosecution, sufficient evidence to justify proceeding with the prosecution;
- prosecution of the offence must not be legally barred;
- the young person must not deny involvement in the offence;
- the young person must not express the wish to have the charge dealt with by the court;
- no admission of guilt made by a young person as a condition of being dealt with by an extrajudicial sanction is admissible against a young person in any civil or criminal proceedings;
- the use of an extrajudicial sanction is not a bar to prosecution or judicial proceedings against the young person, except to the extent that the young person has complied with the terms and conditions of the sanction.

The bill would also provide that certain third parties would be informed of the use of extrajudicial sanctions. Clause 11 would require the oral or written notification of the parents of the young person and clause 12 would give the victim the right to be informed of the young person's identity and of the sanction applied.

C. Part 2: Organization of Youth Criminal Justice System

1. Introduction

Part 2 of Bill C-7 would provide a statutory basis for the existence and powers of certain key actors in the youth criminal justice system.

2. Youth Justice Courts

Clause 13 would provide for the designation of "youth justice courts," either by provincial legislation or by the provincial or federal executives. A judge of a court so designated would be a youth justice court judge. This would replicate existing provisions in the YOA, except that the name of the courts designated for young offender cases would be changed from "youth court" to "youth justice court."

Clause 13 would also provide that other criminal courts, which would otherwise be adult courts, would be *deemed* to be youth justice courts for the purposes of any youth cases before them. Instead of providing for the transfer of certain serious youth cases to the adult criminal justice system, as is done under the YOA, Bill C-7 would make adult sentences available within the youth court system. To do this, however, young offenders would have to be allowed the options of preliminary inquiries and jury trials, which are available in the adult system in serious cases, but which are currently unavailable in the youth court system, except in the case of murder. *Designated* youth justice courts would generally consist of "inferior" courts presided over by provincially appointed judges. However, these types of courts do not generally have the jurisdiction to try criminal cases where there has been a preliminary inquiry[6] and they never conduct jury trials. Clause 13 would, therefore, permit federally appointed superior court judges, who already have the jurisdiction to try such cases, to sit as youth justice court judges, retaining their powers as superior court judges (under clause 14(7)).

As with the current YOA, the youth criminal justice system would retain jurisdiction over adults in respect of alleged offences committed while they were under 18 years of age. Clause 14 would give youth justice courts exclusive jurisdiction over federal offences allegedly committed by persons between the ages of 12 and 17 inclusive, with the exception of regulatory offences dealt with under the *Contraventions Act* and offences subject to military jurisdiction under the *National Defence Act*. Clause 14 would also expressly confer jurisdiction on youth justice courts to make preventative orders such as peace bonds. As is the case with youth courts under the YOA, youth justice court judges under Bill C-7 would, for the purposes of carrying out the provisions of the legislation, be considered to be provincial court judges or

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(6) In Quebec, the provincially appointed Court of Quebec tries such cases when the accused has elected to be tried by a judge without a jury. As in the rest of Canada, however, jury trials in Quebec are presided over by federally appointed superior court judges.

justices of the peace and would have the jurisdiction and powers of a summary conviction court under the *Criminal Code*. Superior courts deemed to be youth justice courts under Bill C-7 would, however, also retain their jurisdiction and powers as a superior court.

As with the YOA, Bill C-7 would preclude extrajudicial measures or judicial proceedings from being taken in respect of any offence after the expiry of any applicable limitation period. Unlike section 5(2) of the YOA, however, clause 14(3) of the bill would provide an exception to this general prohibition where the Crown prosecutor and the young person agreed. Thus, the prosecution would be able to proceed summarily in cases where it would otherwise be forced to proceed by indictment in order to retain the ability to prosecute.

Clause 15 of the bill would deal with contempt of court in the youth justice system, for the most part, re-enacting the current provisions on contempt set out in section 47 of the YOA. A youth justice court would have the same powers to deal with contempt of court as a superior court judge in that province; youth justice courts would have jurisdiction over any contempt by a young person against any court, and over contempts committed in the face of a youth justice court by an adult; a young person convicted of contempt of court would be subject to a youth sentence under Part 4 of the bill; section 708 of the *Criminal Code* would apply to contempt proceedings against adults in the youth justice courts. This last provision would enable youth justice courts to deal summarily with adult witnesses who failed to attend or remain at youth justice court proceedings when legally required to do so, and to impose fines of up to $100, imprisonment for up to 90 days, or both, in such cases. Unlike the current youth courts, however, the proposed youth justice courts would not necessarily have any *exclusive* jurisdiction over contempts committed by young persons.

Clause 16, dealing with the jurisdictional problem that arises when an offence charged is alleged to have been committed during a period that includes the accused's 18th birthday, would confer jurisdiction on the youth justice court in such cases. Where it was proven during the proceedings that the offence had in fact been committed after the accused had attained the age of 18, the youth justice court would be free to sentence the accused as an adult.

Clause 17 would replicate section 68 of the YOA to confer on the judges of the youth justice courts in each province the power to make rules for the youth justice courts on matters such as: the duties of the officers of the court; practice and procedure before the court; the forms to be used; and any other appropriate matter "considered expedient to attain the ends of

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justice." Such rules of court would be subject to any regulations made by the Governor in Council under clause 155. As with such rules under the YOA, rules of court made under clause 17 would have to be approved by the provincial lieutenant governor in council and be published in the provincial gazette.

3. Youth Justice Committees

Section 69 of the YOA provides for the creation of youth justice committees, which are committees of citizens appointed to assist without remuneration in the administration of the Act or in any programs or services for young offenders. The actual establishment of such committees is left to each provincial attorney general, or such other minister as designated by the lieutenant governor in council of the province, who is also responsible for specifying how committee members are appointed and the functions of the committees.

Clause 18 of the bill would retain this provision, but would remove the stipulation that committee members serve without remuneration and would authorize the federal Attorney General to establish such committees as well. Clause 18 would also provide specific legislative guidance as to the functions of the committees. Pursuant to clause 18(2), youth justice committees could perform the following functions:

- giving advice to the police or Crown attorneys on the appropriate extrajudicial measure in a particular case;
- soliciting the concerns of the victim and facilitating his or her reconciliation with the young person;
- ensuring that various community support resources were available to the young person;
- helping to coordinate the interaction of the youth criminal justice system with child protection agencies or community groups involved with the young person;
- advising the federal and provincial governments on compliance with the provisions of the legislation which grant rights to young persons or provide for the protection of young persons;
- advising the federal and provincial governments on youth criminal justice policies and procedures;

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- providing information to the public on the legislation and the youth criminal justice system;
- acting as a conference (see below); and
- any other functions assigned by the federal or provincial attorney general.

By enhancing the legislative emphasis on youth justice committees, and by emphasizing their potential role in coordination between the youth criminal justice system and other institutions and systems involved with young persons in the community (such as the education and child protection systems), clause 18 of the bill would address key aspects of the 1997 Justice Committee report's conclusions and recommendations. However, while that report seemed to favour achieving coordination with these other institutions and systems through their representation on the youth justice committees,[7] Bill C-7 is silent as to the composition of these committees.

4. Conferences

As with youth justice committees, conferences are intended to allow persons outside the court system to be involved in the youth criminal justice system by formulating more creative community-based responses to youth offending. However, unlike youth justice committees, conferences would generally be *ad hoc* groups of individuals convened to deal with a specific case. Typically, a conference would bring together in an informal setting the offender, his or her family, the victim, and the victim's supporters, with a view to an open discussion of the offence and its impact, and arriving at a resolution, such as an apology, restitution, or community service. The conference concept was inspired by family group conferencing experiences in other countries, such as New Zealand and Australia, and successful experiments in certain remote communities in Canada, as well as Aboriginal models of community or "circle" sentencing. The 1997 House of Commons Justice Committee report recommended that the youth criminal justice system be reformed to accommodate alternative responses to youth crime, such as conferencing.[8]

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(7) *Renewing Youth Justice*, p. 55-57.

(8) *Ibid.*, p. 49-55 and recommendation 7.

Clause 19 of the bill would provide a legislative basis for such conferences. Clause 19(1) would provide that conferences could be convened by a youth justice court judge, the provincial director for youth criminal justice (see below), a police officer, or any other person charged with making a decision required under the legislation. Clause 19(2) suggests possible mandates for such conferences: to give advice on extrajudicial measures, conditions for pre-trial release, and sentences, including the review of sentences and reintegration plans (see below, with respect to clauses 59, 89 and 93-95). As with the youth justice committees, the bill leaves considerable flexibility as to the actual implementation of conferencing, but provides the provinces with authority to make rules for the conduct of such conferences (other than those convened by a youth justice court judge or justice of the peace, which would presumably be subject to rules made under clause 17 (clause 19(3)).

5. Justices of the Peace and Youth Justice Court Clerks

Clauses 20 and 21 of the bill would effectively re-enact existing YOA provisions dealing with the powers of justices of the peace and youth court clerks (see YOA sections 6 and 65). The only change would be clause 20(2), which would clarify that justices of the peace could conduct peace bond proceedings against young persons under section 810 of the *Criminal Code*. However, any failure or refusal by a young person to comply with an order by a justice of the peace to enter into a recognizance (peace bond) would have to be referred to a youth justice court.

6. Provincial Directors

Provincial directors are persons, groups of persons, or bodies appointed or designated by the provinces to perform the duties assigned to provincial directors under the YOA: overseeing aspects of the youth criminal justice system, such as detention and custody of young persons, pre-sentencing assessments, administration of supervision or probation orders, and the review of dispositions. Bill C-7 would retain this position and, in clause 22, would effectively re-enact section 2.1 of the YOA which permits provincial directors to authorize other persons to perform their duties and functions under the legislation on their behalf.

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D. Part 3: Judicial Measures

1. Pre-Charge Screening

Clause 23 would permit pre-charge screening programs to be established by the various provincial and federal attorneys general. The purpose of such programs is to divert cases away from the formal judicial process where a lesser response, such as extrajudicial measures (currently, "alternative measures") would be adequate. For the most part, this provision would merely provide a federal statutory framework for and recognition of pre-charge screening and diversion programs that already exist.

Clause 24 would ensure that the opportunity to screen appropriate cases out of the formal judicial process extended to private prosecutions, by requiring that the relevant attorney general's office consent to any such prosecutions.

2. Right to Counsel

Section 10(b) of the *Canadian Charter of Rights and Freedoms* guarantees to every person who is arrested or detained the right "to retain and instruct counsel without delay and to be informed of that right." Section 11 of the YOA expands upon this basic guarantee by specifying in greater detail young persons' right to counsel in the youth criminal justice system, and how that system is to give effect to that right. Clause 25 of the bill would essentially replicate the provisions of section 11 of the YOA.

There would be a general statement of a young person's right to retain and instruct counsel, and to do so personally (i.e., this right need not be exercised through a parent or guardian even though it may involve a contractual relationship), at any stage of proceedings against the young person, including before or during any consideration as to the appropriateness of an extrajudicial sanction as an alternative to judicial proceedings (clause 25(1)).

Clause 25 goes on to propose that young persons would have to be advised of their right to counsel, and be given a reasonable opportunity to exercise that right at specific points in the youth criminal justice process. The police would be required to conform with this provision upon the arrest or detention of a young person (clause 25(2)). Thereafter, courts or review boards conducting various proceedings under the bill would likewise have to advise the

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young person of his or her right to counsel, unless the young person was already represented (clause 25(3)).

Where a young person wished to obtain legal counsel, but was unable to do so, courts or review boards conducting proceedings would have to refer him or her to the province's legal aid program for the appointment of counsel (clauses 25(4)(a) and 25(6)(a)). If no legal aid program was available to the young person, or if the young person was unable to obtain counsel through the program, the court or review board would have to direct that he or she be represented by counsel (clauses 25(4)(b) and 25(6)(b)) to be appointed by the provincial attorney general's office (clause 25(5)).

Clause 25(7) would provide that a court or review board could permit the young person, at his or her request, to be assisted by an adult whom it considered to be suitable, rather than by legal counsel.

Clause 25(9) would provide that a statement of the young person's right to be represented by counsel would have to be included in various documents issued in connection with the proceedings against the young person.

The courts would also continue to be responsible for ensuring that a young person was represented by counsel independent of the young person's parent, where it appeared that there was a conflict of interest between the parent and the young person or that this would be in the best interests of the young person (clause 25(8)).

Clause 25 would also add two new provisions on young persons' right to counsel in the youth criminal justice system. Clause 25(10) would clarify that nothing in the bill would prevent a province from establishing a program for the recovery of the costs of such counsel from the young person or from his or her parents; however, such costs could be recovered only after all the proceedings in the case had been completed. Clause 25(11) would restrict the application of certain of the above requirements to accused persons under 20 years of age at the time of their first appearance before the youth justice court in respect of an offence.

3. Notices to Parents

In order to reinforce the principle of parental responsibility, the YOA includes provisions requiring that parents be notified when young persons become involved with the youth criminal justice system, and, in some cases, that parents attend youth court proceedings.

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These provisions (sections 9 and 10) of the YOA would be preserved in clauses 26 and 27 of Bill C-7.

Clause 26(1) would require a young person's parent to be notified as soon as possible when the young person was arrested and detained pending a court appearance. In cases where the young person was issued a summons or an appearance notice, or was released by police pending a court appearance, clause 26(2) would require the police to give a parent written notice of the summons, appearance notice, promise to appear, undertaking, or recognizance, as the case might be. Under a new provision, clause 26(3), a parent would also have to be given written notice of any ticket issued to a young person under the *Contraventions Act* (which deals with federal regulatory offences).

In cases where no parent appeared to be available, any notice under clause 26 could be given to any adult relative who was known to the young person and was likely to assist him or her. Where no such relative was available, notice could be given to another appropriate adult known to the young person and likely to be of assistance. Where there was doubt as to who should be given a notice under clause 26, clause 26(5) would allow the court to decide the issue.

Generally, the failure to give the notices required under clause 26 would not affect the validity of proceedings under the bill (clause 26(9)); however, where the notices were not given, and none of the persons to whom such notice could be given attended court with the young person, the court would have to either: adjourn the proceedings so that notice could be given as the court directed; or dispense with the notice, if the court deemed it appropriate (clauses 26(10) and (11)).

In a new provision, clause 26(12) would restrict the application of the parental notification requirements to cases where the accused was less than 20 years of age at the time of his or her first appearance before a youth justice court in respect of the offence in question.

Where a youth justice court was of the opinion that the attendance of a young person's parent was necessary or in the young person's best interest, the court could order such attendance at any stage of the proceedings (clause 27). A parent who failed to attend as required by the youth justice court, without lawful excuse, would be liable to be summarily convicted and punished for contempt. Clause 27 would not apply to proceedings commenced by ticket under the *Contraventions Act*.

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4. Pre-Trial Detention

a. Introduction

Notwithstanding the presumption of innocence, the criminal justice system recognizes the need for the pre-trial detention of accused persons in some cases. In both the adult and youth criminal justice systems, pre-trial detention is aimed at: ensuring the accused's future attendance in court to deal with the charge; the protection or safety of the public, including the prevention of further criminal offences; and ensuring the integrity of the administration of justice. As a general matter, the onus is on the prosecution to show that pre-trial detention is necessary; however, the onus to avoid pre-trial detention shifts to the accused where he or she is charged with: certain serious indictable offences; any indictable offence where the accused is not ordinarily resident in Canada; any indictable offence committed while the accused had other criminal charges pending; or breaching conditions of pre-trial release.

The bill would, with some minor refinements, retain the provisions on pre-trial detention of young persons set out in section 7 of the YOA.

b. Rules Governing the Pre-Trial Detention of Young Persons

A new provision, clause 28, would clarify that, except as inconsistent with or excluded by the bill, the provisions of Part XVI of the *Criminal Code* that apply to the judicial interim release and pre-trial detention of adults would also apply to young persons.

Another new provision, clause 29, is aimed at situations where the courts might be making inappropriate use of pre-trial detention in respect of young persons. Clause 29(1) would stipulate that young persons must not be subject to pre-trial detention as a substitute for appropriate child protection, mental health or other social measures. Under clause 29(2), a presumption would be created that the pre-trial detention of a young person was not necessary to protect the public where the young person could not be sentenced to custody if convicted of the offence charged. This presumption would not prevail, however, where there was a substantial likelihood that the young person would, if released, commit a criminal offence or interfere with the administration of justice. It is not clear how this new presumption would differ from the test that would otherwise be applicable in such cases under Part XVI of the *Criminal Code*.

Young persons who were arrested and detained prior to sentencing would be detained separate and apart from adults (clause 30(3)) in facilities provincially designated for temporary detention (as opposed to facilities for persons actually serving sentences of imprisonment) (clause 30(1)). However, these restrictions would not apply where a young person was being temporarily restrained after arrest and was under the supervision and control of a peace officer (clause 30(7)). Moreover, young persons could be detained with adults where a youth justice court judge or a justice of the peace was satisfied that: having regard to the young person's safety or the safety of others, he or she could not be detained in a place of detention for young persons; or there was no such place of detention within a reasonable distance (clause 30(3)). In a change from section 7(2) of the YOA, clause 30(3) of the bill would add that, in making such a determination, the court would have to have regard for the best interests of the young person. This addition would bring Canadian law on this subject more into line with the UN *Convention on the Rights of the Child*, to which Canada is a party.[9]

Provincial directors would retain the authority to transfer detained young persons from one place of temporary detention to another (clause 30(6)). Also, the pre-trial detention of young persons would remain subject to the decision of any provincially designated person or body whose authorization was required in connection with the detention of a young person in the province (clause 30(8) and (9)).

c. Pre-Trial Detention of Adults Subject to the Youth Criminal Justice System

Clauses 30(4) and (5) would add new rules to provide for accused who were adults when subject to pre-trial detention under the bill, or who became adults during this period. If a youth justice court considered it to be in the best interests of the young person, it could order the transfer to an adult facility of a young person who turned 18 while in pre-trial detention

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(9) Article 37(c) of the Convention obliges States Parties to ensure that:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults *unless it is considered in the child's best interest not to do so…*

Canada has made the following reservation to this provision of the Convention: "The Government of Canada accepts the general principles of article 37(c) of the Convention, but reserves the right not to detain children separately from adults where this is not appropriate or feasible."

(clause 30(4)). Such a transfer would only be on the application of the provincial director and only after the young person had been given an opportunity to be heard. Accused persons who were 20 years of age or older, and who were subject to pre-trial detention in respect of charges in the youth justice court, would have to be detained in an adult facility (clause 30(5)).

d. Placement with "Responsible Person" as Alternative to Detention

Clause 31 of the bill would retain the YOA provisions for the placement of a young person in the care of a "responsible person" as an alternative to pre-trial detention (see YOA section 7.1). This option would be open to the court in cases where the young person would otherwise be detained and where both the young person and the responsible person were willing to enter into such an arrangement. Written undertakings to comply with various conditions would be required of both parties. Such a placement arrangement could be terminated by order of the youth justice court on the application of either party or any other person; in the latter case, the court would make an order relieving the parties of their obligations under the arrangement and issue a warrant for the young person's arrest. The young person would then be brought back before the youth justice court for a bail hearing.

Clause 31 would make some changes to these provisions. Clause 31(1) would specify that a director or employee of a program for young persons could be a "responsible person" into whose care a young person could be placed pending trial. Under clause 31(2), the judge or justice conducting a bail hearing in respect of a young person would have to inquire as to the availability of a responsible person for such a placement, before ordering the young person's detention in custody. Finally, where such a placement arrangement was terminated and the young person was brought back before the court, the court could simply substitute another placement arrangement, rather than holding another bail hearing (clause 31(6)).

e. Review of Bail Decisions

With respect to the review of orders releasing or detaining young persons before trial, the current YOA provisions (section 8) would effectively be re-enacted in clause 33 of the bill.

Bail review proceedings for young persons would, for the most part, be similar to those in the adult criminal justice system, but with the involvement of an additional layer of

judicial review in some cases. An application to review a bail decision made by a justice of the peace or a provincial court judge who was not a youth justice court judge would first be made to a youth justice court, rather than directly to a judge of the province's superior court of criminal jurisdiction, as would be the case in the adult system (clauses 33(1) and (7)).

An application to review a bail decision made by a youth justice court judge who was a superior court judge would be made to a judge of the relevant court of appeal, except in Nunavut, where such a review would be conducted by another judge of the Nunavut Court of Justice (clauses 33(5) and (6)).

In the case of an offence referred to in section 522 of the *Criminal Code* – which refers to indictable offences that, in the adult system, can be tried only by a superior court of criminal jurisdiction (the most important of which is murder) – a young person could be released only by a youth justice court judge (clause 33(8)). Any review of such a decision would go to the court of appeal (clause 33(9)).

5. Appearance

As with section 12 of the YOA, clause 32 of the bill provides that certain information must be formally conveyed to an accused young person at the time of his or her first appearance in court to answer to a criminal charge: the precise nature of the charge as set out in the information; the right of the young person to be represented by counsel; and, if applicable, the prospect and consequences of being dealt with as an adult if the young person is convicted (clause 32(1)). However, the young person can waive this requirement if his or her counsel advises that the young person has been informed of these matters (clause 32(2)).

Clause 32(3) would provide that, before accepting a plea to a charge from an unrepresented young person, the court would have to: satisfy itself that the young person understood the charge; if applicable, explain to the young person the consequences of being liable to an adult sentence and how the young person could apply for the imposition of a youth sentence instead; and explain to the young person that he or she could plead guilty or not guilty to the charge, or, where the young person might be liable to an adult sentence if convicted, explain his or her options as to the mode of trial. If not satisfied that the young person understood the foregoing matters, the court would have to direct that the young person be represented by counsel (clause 32(5)). If not satisfied that the young person understood the

charge, the court would have to enter a plea of not guilty and proceed with the trial, except where the young person would be liable to an adult sentence and had to elect the mode of trial (clause 32(4)).

6. Medical and Psychological Reports

The provisions of the YOA dealing with medical, psychiatric, and psychological assessments of young persons (section 13) would effectively be reproduced in clause 34 of Bill C-7 (except that references to transfer proceedings would be replaced by references to the imposition of adult sentences consistent with the new sentencing scheme proposed in Part 4 of the bill).

Pursuant to clause 34(2) of the bill, court-ordered medical, psychiatric, or psychological assessments could be conducted for the following purposes:

- considering an application for review of a bail decision;
- deciding on an application for or against the imposition of an adult sentence;
- making or reviewing a youth sentence;
- considering an application to continue custody beyond the "custodial portion" of a sentence of custody and supervision;
- setting conditions for release from custody on conditional supervision;
- making an order suspending or reinstating conditional supervision;
- authorizing disclosure of information contained in a youth record; or
- making an intensive rehabilitative custody and supervision order (this sentence would be available only where a young person was convicted of certain serious violent offences).

Clause 34(1) would provide that a youth justice court could order that a young person be assessed by a qualified person, either on the consent of the young person and the prosecutor, or otherwise, where the court believed that such an assessment was necessary for one of the purposes listed above and where:

- the court had reasonable grounds to believe that the young person might be suffering from a physical or mental illness or disorder, a psychological disorder, and emotional disturbance, or a learning or mental disability;
- the young person had a history of repeated youth convictions; or
- the young person was accused of a serious violent offence.

For the purposes of conducting such an assessment, clause 34(3) would enable the court to remand the young person in custody for a period not exceeding 30 days. However, the court could only do this without the consent of the young person where it was satisfied that custody was necessary to conduct the assessment, or the young person had to be detained in custody in any event (clause 34(4)).

The qualified person would be required to report to the court in writing the results of the assessment (clause 34(1)), which would form part of the record of the case (clause 34(12)). Unless disclosure of such a report would be harmful to the young person (see below), the court would have to send a copy of it to the young person, defence counsel, the prosecutor, and a parent of the young person who was in attendance at the proceedings or was otherwise taking an active interest in the case (clause 34(7)). On application to the court, the prosecution or the defence would be given an opportunity to cross-examine the qualified person on the report (clause 34(8)).

Notwithstanding the foregoing, a private prosecutor would be denied access to all or part of such a report where, in the court's opinion, the information was not necessary for the prosecution of the case and its disclosure might be prejudicial to the young person (clause 34(9)). Moreover, the youth justice court would be required to withhold from a young person, his or her parents, or a private prosecutor, all or part of any such report whose disclosure, in the court's opinion, would seriously impair the treatment or recovery of the young person, or would likely endanger the life, safety or psychological well-being of another person (clause 34(10)). The report could be disclosed to those persons where the court was of the opinion that disclosure was essential in the interests of justice (clause 34(11)). Furthermore, notwithstanding any other provision of the bill, a qualified person could disclose information in such a report to a person having the care of a young person in custody who was thought likely to endanger his or her own life or safety or that of others (clause 34(13)).

7. Child Welfare Referral

At any stage of proceedings against a young person, a youth justice court judge may refer the young person to a child welfare agency to determine if he or she is in need of child welfare services (clause 35).

8. Adjudication

Clause 36 of the bill would simply provide that, where a young person pleaded guilty to an offence and the youth justice court was satisfied that the facts supported the charge, the court must find the young person guilty of the offence. Otherwise, the youth justice court would have to proceed with a trial and then either find the young person guilty or not guilty, or dismiss the charge. This would effectively re-enact the provisions of sections 19(1) and (2) of the YOA.

9. Appeals

The provisions of the bill governing appeals of youth justice court decisions are similar to those contained in the YOA (see sections 27, 47(6) and 10(4)).

Clause 37(1) would provide that appeals in respect of offences prosecuted by indictment would be governed by the *Criminal Code* provisions for appeals in indictable cases (Part XXI), subject to any modifications required in the circumstances. Clause 37(5) would similarly apply the provisions of Part XXVII of the *Criminal Code* to summary conviction appeals in the youth system. Where a young person was tried jointly for indictable and summary conviction offences, an appeal would be governed by the provisions for appeals in indictable cases (clause 37(6)).

Clauses 37(2) and (3) would provide for appeals in contempt of court cases. Although contempt proceedings under the bill would be summary in nature, under clauses 37(2) and (3) an appeal of a conviction or sentence for contempt imposed by a youth justice court would be dealt with as an appeal in a case prosecuted by indictment.

Clause 37(4) would provide for the consolidation of appeal proceedings with respect to a number of matters relating to sentencing. Unless the appellate court ordered otherwise, certain findings and orders of the youth justice court that followed a conviction would

all have to be part of the same appeal proceeding: a finding that an offence was a "serious violent offence" (clause 42(9)); a decision on an application for or against the imposition of an adult sentence (clause 72(1)); a decision on an application for a publication ban on information that could identify a young person dealt with under the bill (clause 75(3)); or a decision on the custodial placement of a young person who had received an adult sentence of imprisonment (clause 76(1)).

In jurisdictions where the youth justice court was a superior court, an appeal on a summary conviction matter would lie to the relevant court of appeal (clause 37(8)). There would be an exception for Nunavut, where such an appeal would lie first to a judge of the Nunavut Court of Appeal, from whose decision there could be a further appeal to the full court (clause 37(9)).

Clause 37(10) would provide that there could be no appeal of a youth justice case to the Supreme Court of Canada without the leave of that Court. This is consistent with the current YOA section 27(5), except for the elimination of the requirement that the Supreme Court's leave for the appeal must be granted within 21 days of the court of appeal decision (or within such extended time as the Court might, for special reasons, allow). In the absence of this special deadline, the 60-day deadline provided for in the *Supreme Court Act* (section 58) would apply.

Like the current section 27(5) of the YOA, clause 37(10) of the bill precludes appeals as of right (i.e., without the need to seek leave) to the Supreme Court of Canada in indictable cases. An adult accused can appeal without leave to the Supreme Court on any question of law on which there is a dissent in the court of appeal, or on any question of law where the court of appeal has substituted a conviction for an acquittal (*Criminal Code* section 691). The effect of section 27(5) of the YOA and of clause 3 7(10) of the bill is to foreclose this right of appeal in youth justice cases.[10]

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(10) This interpretation has been confirmed by the Supreme Court itself in: *R.* v. *C. (T.L.)*, [1994] 2 S.C.R. 1012, 92 C.C.C. (3d) 444. Since the issue had been raised in response to a motion, and there had not been adequate argument or the required notice to the various Attorneys General, the Court declined to address the argument that the deprivation of this avenue of appeal in youth cases amounted to unconstitutional discrimination on the basis of age contrary to section 15(1) of the *Canadian Charter of Rights and Freedoms*.

Clause 37(11) would preclude any appeal from youth sentence review proceedings (see below, with respect to clauses 59 and 94-96).

E. Part 4: Sentencing

1. Introduction

It is in the area of sentencing that Bill C-7 proposes the most substantive changes to the current law. First of all, the bill would add a statement of purpose and principles applicable to youth sentencing in general, as well as a series of principles to govern the use of custodial youth sentences in particular. Unlike the general principles expressed in the Declaration of Principle in clause 3, which would apply to the interpretation and application of the bill in general, these principles set out in Part 4 would be specifically directed to sentencing. The bill also proposes to create some new youth sentences, expand the category of cases where an adult sentence could be imposed, and alter the procedure for gaining access to adult sentences.

2. Purposes and Principles

a. Introduction

Clauses 38 and 39 of the bill set out a series of principles that would guide the youth justice courts in the sentencing of young persons who were subject to a youth sentence under the bill. Clause 38 deals with principles and factors that would be applicable to the imposition of youth sentences generally, while clause 39 sets out the conditions for imposing a sentence of custody on a young person. Clauses 38 and 39 would apply only where the young person was to be given a youth sentence. In cases where an adult sentence was to be imposed, the *Criminal Code* rules and principles for sentencing would apply.

b. Purpose and Principles of Youth Sentencing

Clause 38(1) asserts that the purpose of imposing a youth sentence is: "to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, **thereby contributing to the long-term protection of the public."**

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Clause 38(2) provides that youth sentences would have to be determined in accordance with the following principles, as well as those set out in the bill's Declaration of Principle in clause 3.

a) the sentence must not result in a greater punishment than would be appropriate for an adult convicted of the same offence committed in the same circumstances;

b) the sentence would have to be similar to the sentences imposed, in that region of the country, on other young persons found guilty of the same offence committed in similar circumstances;

c) the sentence would have to be proportionate to the seriousness of the offence and the young person's degree of responsibility for it; and

d) subject to c), the sentence would have to:
   i. be the least restrictive sentence that was consistent with the overall goal of youth sentencing set out in clause 38(1) (above);
   ii. be the sentence most likely to promote the young person's rehabilitation and reintegration into society; and
   iii. promote a sense of responsibility in the young person, including his or her acknowledgement of the harm done to the victim and the community.

Clause 38(3) would require the youth justice court to take the following factors into account when determining a youth sentence:

a) the degree of participation of the young person in the offence;

b) the harm done to the victims and whether it was intentional or reasonably foreseeable;

c) any reparation made by the young person to the victim or the community;

d) any time spent by the young person in pre-trial detention as a result of the offence;

e) previous findings of guilt against the young person; and

f) any other aggravating and mitigating circumstances relevant to the purpose and principles set out in this clause.

The purpose and principles of youth sentencing proposed in clause 38 reflect many of the overall goals of the youth criminal justice system identified in the bill's Declaration of Principle (clause 3). With the exception of clause 38(2)(a), the foregoing purpose and principles are also similar to many of those applicable to the sentencing of adults (see sections

718 to 718.2 of the *Criminal Code*, as well as the relevant jurisprudence). However, consistent with the philosophy underlying the retention of a separate criminal justice system for youth, the purpose and principles of youth sentencing proposed in clause 38 of the bill do not place the same emphasis on denunciation and deterrence of unlawful conduct, which remain prominent considerations in the sentencing of adults (see section 718(a) and (b) of the *Criminal Code*).

The one sentencing principle that is unique to the youth system, proposed in clause 38(2)(a), is that a youth sentence must not be greater than that appropriate for an adult convicted of the same offence under similar circumstances. This would enhance the protection afforded by the current limitation on youth punishment in section 20(7) of the YOA, which only prevents youth sentences from exceeding the *maximum* punishment applicable to an adult for the same offence. Clause 38(2)(a), however, would require youth justice courts to keep youth sentences within the upper limit of what similarly situated adults would actually *receive*.

c. Principles Applicable to Custodial Youth Sentences

Clause 39 seeks to further de-emphasize the use of custodial sentences in the Canadian youth criminal justice system. This aim is motivated by a perception that there is currently an over-reliance on incarceration in that system. Indeed, government statistics suggest that Canada's youth incarceration rate is considerably higher than the Canadian rate for adults and the youth rates in other industrialized countries. Clause 39 would preserve and expand upon the provisions in section 24 of the YOA which also seek to underscore the principle that custody should be reserved for only the most serious youth cases.

Clause 39(1) stipulates that the youth justice court could not sentence a young person to custody unless:

(a) the young person was guilty of a violent offence;

(b) the young person had failed to comply with previous non-custodial sentences;

(c) the young person was guilty of an indictable offence for which an adult could be sentenced to imprisonment for more than two years and had a history of youth court convictions; or

(d) in an exceptional case, the young person has committed an indictable offence and it would be inconsistent with the purpose and principles of youth sentencing set out in clause 38 (above) to impose a non-custodial sentence in light of the aggravating circumstances of the offence.

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Clause 39(2) would further preclude the imposition of a custodial sentence except where the court had considered all reasonable alternatives to custody raised at the sentencing hearing and determined that no alternative sentence or combination of sentences would accord with the purpose and principles of sentencing in clause 38. In making this determination, clause 39(3) would require the court to consider submissions concerning: alternatives to custody that were available in the jurisdiction; evidence of compliance with previous non-custodial sentences; and the alternative sentences used in similar cases.

Clauses 39(4) and 39(5) would foreclose the courts' use of certain factors to justify the imposition of custodial sentences. Clause 39(4) stipulates that the fact that a young person had previously received a particular non-custodial sentence would not preclude resort to that sentence for a subsequent offence. In other words, courts should not feel compelled to impose a more severe sentence when a young person re-offended. Clause 39(5) would preclude the use of custodial sentences as a substitute for appropriate child protection, mental health, or other social measures.

Clause 39(6) would require the court to consider a pre-sentence report on the young person, unless the court was satisfied that a report was unnecessary and both the defence and prosecution consented to dispensing with it (clause 39(7)).

To help ensure that youth justice courts follow the foregoing restrictions and pre-conditions attaching to the imposition of a custodial sentence, clause 39(9) would require the sentencing court to give reasons why a non-custodial sentence would be inadequate for achieving the purpose of youth sentencing in clause 38(1) (above), including, in the case of a custodial sentence imposed under clause 38(2)(d), the reasons why the case is exceptional.

Once a youth justice court decided that a custodial sentence was appropriate and necessary, clause 39(8) would, in determining the length of the sentence, require the court to be guided by the purpose and principles in clause 38. The court would be forbidden from taking into consideration the fact that the young person might be released from custody during the supervision portion of such a sentence (see below) and that the sentence would be subject to regular and periodic review by the court (see clause 94 in Part 5 of the bill). In other words, in determining the length of a custodial sentence, the youth justice court would have to assume that the young person would serve the whole period in custody.

3. Pre-Sentence Report

Pre-sentence reports are intended to provide courts with an independent source of background information on an offender that would be useful in determining a sentence. There is provision for such reports in both the youth and adult criminal justice systems. In the youth system, however, they are currently referred to as "pre-disposition reports" in keeping with the vocabulary of the YOA. Under Bill C-7, since "dispositions" would become "youth sentences," the "pre-disposition reports" would become "pre-sentence reports," as in the adult system. Otherwise, clause 40 of the bill would essentially re-enact the relevant YOA provisions (section 14).

Clause 40(1) would require a provincial director to cause a pre-sentence report to be prepared and submitted to a youth justice court whenever the court thought it advisable or was required to consider such a report (which would be the case where the court was considering a custodial sentence), before imposing sentence.

To the extent that it was relevant to the purpose and principles of sentencing set out in clauses 38 and 39 (above), clause 40(2) would require that, where possible and applicable, a pre-sentence report include:

- the results of an interview with the young person, the young person's parents, and, if appropriate, the young person's extended family;
- the results of an interview with the victim;
- the recommendations from a conference (see clause 19 in Part 2);
- the age, maturity, character, behaviour, and attitude of the young person, and his or her willingness to make amends;
- any plans suggested by the young person to change his or her conduct or to improve himself or herself;
- the history of previous findings of guilt for offences under federal, provincial, or municipal law, and of any resulting community or other services provided to the young person;[11]

(11) For preparing a pre-sentence report, access to records of previous findings of guilt against a young person under the bill in respect of which a youth sentence was imposed, would be subject to the access periods set out in clause 119(2) of the bill (see Part 6). Clause 119(2) would restrict access to such records, depending on the offence and the sentence imposed, to periods ranging from two months from the finding of guilt, where a reprimand was imposed (see "Youth Sentences" below), to five years from the completion of the sentence, in the case of indictable offence where a sentence other than a reprimand or a discharge was imposed.

- the response of the young person to previous sentences, dispositions or services provided;
- the history of alternative measures (YOA) or extrajudicial sanctions used to deal with the young person and the young person's response to those measures;[12]
- the availability and appropriateness of community services and facilities for young persons, and the willingness of the young person to avail himself or herself of them;
- the relationship between the young person and his or her parents, and, if appropriate, between the young person and his or her extended family, including the degree of control and influence that these family members have over the young person;
- the young person's school attendance and performance record and employment record;
- any information that might assist the court in determining whether there was a reasonable alternative to custody under clause 39 (above); and
- any information that the provincial director considered relevant, including any recommendation that the provincial director considered appropriate.

Clause 40(4) would require the pre-sentence report to form part of the record of the case. Copies of a pre-sentence report would be given to the young person and his or her counsel, any parent of the young person in attendance at court or who was otherwise taking an active interest in the case, and the prosecutor (clause 40(5)). Moreover, on application to the court, the defence or the prosecution would be entitled to cross-examine the author of the report (clause 40(6)). However, in the case of a private prosecution, all or part of the report could be kept from the prosecutor where the court was of the opinion that the information might be prejudicial to the young person and was not necessary for the conduct of the prosecution (clause 40(7)).

Any court dealing with matters relating to the young person, and any youth worker assigned to the young person's case would be entitled to receive copies of a pre-sentence report on request from the youth justice court that had received it (clause 40(8)(a)). The court could also supply a copy of the report to any other person who, in the court's opinion, had a valid

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(12) Where an extrajudicial sanction was used, clause 119(2) would limit access to the record to a period of two years from the date that the young person consented to the sanction.

interest in the case (clause 40(8)(b)). In addition, a provincial director could make all or part of a pre-sentence report available to any person to whose custody or supervision the young person had been committed, or to any other person who was directly assisting in the care or treatment of the young person (clause 40(9)).

According to clause 40(10), no statement made by a young person in the course of the preparation of a pre-sentence report would be admissible in evidence against him or her in any civil or criminal proceedings, except for those relating to: the imposition of a youth sentence; the review of a youth sentence; or the decision on an application for or against the imposition of an adult sentence.

4. Youth Sentences

a. Overview

Unless the youth justice court ordered that a young person was to be subject to an adult sentence in accordance with clauses 64(5), 70(2), or 72(1)(b) (see "Adult Sentences," below), the court would have to impose one, or a combination, of the youth sentences listed below under clause 42(2). All the current youth "dispositions" available under section 20(1) of the YOA would be retained under Bill C-7. The bill proposes five new youth sentences, however, and would provide that a portion of a sentence of custody be spent in the community under conditions. Currently, the YOA provides for a period of supervision in the community as a follow-up to a custodial term only in the case of murder.

The five new proposed youth sentences are: a reprimand; an intensive support and supervision program order; a program attendance order; a deferred custody and supervision order; and an intensive rehabilitative custody and supervision order (see clauses 42(2)(a), (l), (m), (p), and (r), below). However, the availability of a number of these new sentences would be dependent on the establishment of programs by the provinces.

b. Sentencing Inputs

Where a youth justice court found a young person guilty of an offence, clause 41 would permit the court to refer the matter to a conference for recommendations as to the sentence (see clause 19).

Clause 42 would set out the various youth sentences available and certain rules and conditions associated with them. Before imposing a youth sentence, the court would have to consider: any conference recommendations; any pre-sentence report; any representations made by the prosecution or defence; any representations made by the parents of the young person; and any other relevant information before the court (clause 42(1)).

c. Possible Youth Sentences

Clause 4 2(2) would require a youth justice court that found a young person guilty of an offence to impose one or any combination of the following sentences that were not inconsistent with each other (where applicable, the corresponding YOA provision appears in parenthesis):

a) a reprimand (new);

b) an absolute discharge (YOA s. 20(1)(a));

c) a conditional discharge (with supervision by the provincial director) (YOA s. 20(1)(a.1));[13]

d) a fine to a maximum of $1,000 (YOA s. 20(1)(b));[14]

e) an order to pay certain types of damages to another person (YOA s. 20(1)(c) – however, the new provision would add references to applicable Quebec civil law terminology);[15]

f) an order for the restitution of property to another person (YOA s. 20(1)(d));[16]

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(13) In addition to any other youth sentences that might obviously be incompatible, clause 42(11) stipulates that the following youth sentences could not be combined with a conditional discharge: a probation order under clause 42(2)(k), an intensive support and supervision order under clause 42(2)(l), and a program attendance order under clause 42(2)(m).

(14) Clause 54(1) would require youth justice courts, in deciding to sentence the young person to pay a fine under clause 42(2)(d), to consider the young person's ability to pay. Clause 54(2) would permit a young person to pay off all or part of a fine under this clause by performing work in a program established by the province for that purpose.

(15) Clause 54(1) would require youth justice courts to consider the young person's ability to pay in deciding to sentence the young person to pay compensation under clause 42(2)(e). Where a youth justice court was contemplating such an order, clause 53(4) would permit the court to receive representations from the person to be compensated.

(16) Where a youth justice court was contemplating such an order, clause 54(4) would permit the court to receive representations from the person to whom restitution would be made.

g) an order to compensate any innocent purchaser of property in respect of which the court had made a restitution order (YOA s. 20(1)(e));[17]

h) an order to compensate any person in kind or by way of personal services, in lieu of monetary damages or compensation under e) or g) (YOA s. 20(1)(f));[18]

i) an order to perform a community service and to report to, and be supervised by, the provincial director or a person designated by the court (YOA s. 20(1)(g));[19]

j) make any prohibition, seizure, or forfeiture order that could be imposed under federal legislation (except a prohibition order under section 161 of the *Criminal Code*[20]) (YOA ss. 20(1)(h) and 20(11));

k) place the young person on probation for up to two years (YOA s. 20(1)(j));

l) subject to the agreement of the provincial director, order the young person into an intensive support and supervision program as directed by the provincial director (the content of any such programs would be determined by the provinces – existing programs provide for closer monitoring and more support than ordinary probation) (new);

m) subject to the agreement of the provincial director, order the young person to attend a non-residential program approved by the provincial director, for a maximum of 240 hours over a period of up to six months (new);[21]

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(17) Clause 54(1) would require youth justice courts, in deciding to sentence the young person to compensate an innocent purchaser under clause 42(2)(g), to consider the young person's ability to pay. Where a youth justice court was contemplating such an order, clause 54(4) would permit the court to receive representations from the innocent purchaser.

(18) Where a youth justice court was contemplating such an order, clause 54(4) would permit the court to receive representations from the person to be so compensated, and, pursuant to clause 54(6), the person's consent would be required before such an order could be made. Moreover, pursuant to clause 54(7), before making such an order, the court would have to be satisfied that the young person was a suitable candidate for it, and that it would not interfere with his or her normal hours of work or education. Clause 54(8) would limit the scope of such an order to those personal services that could be performed within 240 hours over a period of not more than one year.

(19) Before making such an order, clause 54(7) would require that the court be satisfied that the young person was a suitable candidate for it, and that it would not interfere with his or her normal hours of work or education. Clause 54(8) would limit the scope of such an order to those services which could be performed within 240 hours over a period of not more than one year. Pursuant to clause 54(9), such an order could only be imposed where the services were part of a program approved by the provincial director, or where the court was satisfied that the recipient of the services agreed to their performance by the young person.

(20) Section 161 of the *Criminal Code* provides for the making of an order prohibiting persons convicted of certain offences from attending near public places where persons under 14 are likely to be present, or from obtaining employment in which the person would be in a position of trust or authority towards persons under 14.

(21) Before making such an order, clause 54(7) would require the court to be satisfied that the young person was a suitable candidate for the program, and that it would not interfere with his or her normal hours of work or education.

n) make a custody and supervision order of up to three years, where the young person was found guilty of an offence punishable by life imprisonment under the *Criminal Code*, or up to two years, in any other case – under this sentence, the young person would be ordered to spend two-thirds of the period in custody, and one-third in the community under conditions (this designated period of supervised release would be analogous to statutory release for adults under the *Corrections and Conditional Release Act*, and would be a change from the current custody disposition under YOA s. 20(1)(k));

o) make a custody and supervision order of up to three years, where the young person was found guilty of the presumptive offence of attempted murder, manslaughter or aggravated sexual assault – the youth court judge to specify the portion of the period to be spent in custody (new);

p) make a deferred custody and supervision order (this would be like a suspended or conditional sentence in the adult system) for a period of up to six months, subject to appropriate conditions[22][23];

q) continuous custody and supervision for up to seven or ten years (applicable only to murder, see below) (YOA s. 20(1)(k.1));

r) intensive rehabilitative custody and supervision (applicable only to **murder,** attempted **murder, manslaughter, aggravated sexual assault, or a third "serious violent offence,"** in certain circumstances, see below) (new); or

s) impose any other reasonable and ancillary condition on the young person that the court considered advisable and in the best interests of the young person and the public (YOA s. 20(1)(l)).

d. Youth Sentence for Murder

In addition to any of the other above sanctions that the court considered appropriate, where a young person subject to a youth sentence was convicted of murder, a youth justice court would have to impose one of the following sentences:

- in the case of first degree murder, custody and supervision for up to ten years, with a continuous custodial period of up to six years, followed by conditional supervision in the community (clause 42(2)(q)(i)); or

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(22) Clause 42(5) would preclude the availability of this sentence in the case of a "serious violent offence" (see clause 2). Curiously, however, the bill says nothing about the possibility of imposing lesser youth sentences (such as a reprimand or a discharge), or even using extrajudicial measures (see Part 1 of the bill), in respect of serious violent offences.

(23) The terms and conditions applicable to release on conditional supervision (clauses 105(2) and 105(3)) in Part 5 of the bill would apply to deferred custody and supervision, as would the provisions governing suspension and cancellation of conditional supervision for breach of conditions (see clauses 106-109 in Part 5 of the bill).

- in the case of second degree murder, custody and supervision for up to seven years, with a continuous custodial period of up to four years, followed by conditional supervision in the community (clause 42(2)(q)(ii)).

As an alternative, the court could, in an appropriate case, make an order of *intensive rehabilitative* custody and supervision (see below), subject to the same maximum periods for the custodial and supervision portions of the sentence (clauses 42(2)(r)(ii) and (iii)).

As with the current section 20(1)(k.1) of the YOA, a young person found guilty of murder and sentenced under clauses 42(2)(q) or (r) of the bill would face the possibility of being incarcerated for five years or more, thereby triggering the right to a jury trial guaranteed in section 11(f) of the *Canadian Charter of Rights and Freedoms*. Therefore, as with sections 19 and 19.1 of the YOA, clauses 66 and 67 of the bill (see below under "Adult Sentences") provide for an election as to mode of trial in such cases.

Clauses 66 and 67 would, however, expand the trial options available to young persons in this situation. Currently, where a young person wants a preliminary inquiry, he or she must elect to be tried by a judge and jury. Under clauses 66 and 67, a young person in that situation could elect to have a preliminary inquiry and be tried by a judge alone, thus enjoying the same right of election as is available under the *Criminal Code* in most indictable cases.

e. Intensive Rehabilitative Custody and Supervision

Under clause 42(2)(r), a new youth sentence – an "intensive rehabilitative custody and supervision order" – could be made in respect of a **conviction for** murder, attempted murder, manslaughter, aggravated sexual assault; or any other offence involving serious violence that would be punishable in the adult system by imprisonment for more than two years, where the young person had previously been found guilty of at least two such offences. Pursuant to clause 42(7), this sentence would be subject to the following prerequisites: the young person would have to suffer from a mental illness or disorder, a psychological disorder, or an emotional disturbance; a plan of treatment and intensive supervision would have to have been developed for the young person, and there would have to be reasonable grounds to believe that the plan might reduce the risk of the young person's committing another presumptive offence; and the provincial director would have to consent to the young person's participation in the program.

The order would commit the young person to an initial period of continuous intensive rehabilitative custody, followed by conditional supervision in the community for the remaining period of the order. In cases other than murder (see above), such an order would be for a maximum period of three years in the case of an offence punishable under the *Criminal Code* by imprisonment for life, or two years, in any other case (clause 42(2)(r)(i)).

Although it would be up to the provinces to give content to the sentence by establishing the necessary programs, this proposed new sentence is intended to provide greater control and treatment for serious violent offenders with significant psychological, mental, or emotional illnesses or disturbances. However, clause 42(8) ensures that a young person subject to such a sentence retains his or her rights regarding consent to treatment.

f. "Serious Violent Offence" Determination

Pursuant to clause 42(9), a youth justice court that had found a young person guilty of an offence could, on the application of the prosecution and after hearing both parties, determine that the offence was a serious violent offence and endorse the information accordingly. A "serious violent offence" is defined in clause 2 of the bill as "an offence in the commission of which a young person causes or attempts to cause serious bodily harm." Upon the third such determination, a young person who was at least 14 (depending on whether the province has opted to set a higher minimum age for the presumptive application of adult sentences under clause 61) would be subject to an adult sentence, unless the young person could satisfy the court that a youth sentence would be sufficient to hold him or her accountable.

g. Total Duration of Youth Sentences

Clause 42(14) would limit the total duration of a youth sentence in respect of any single offence to two years, except for an order of prohibition, seizure or forfeiture (clause 42(2)(j)), an order for custody and supervision, or an order for intensive rehabilitative custody and supervision (clauses 42(2)(n),(o),(q) or (r)). Where the young person was found guilty of more than one offence, the combined duration of the youth sentences would be limited to three years, except for first and second degree murder, where the total duration of youth sentences would be limited to ten and seven years, respectively (clause 42(15)). Equivalent provisions are found at sections 20(3) and (4) of the YOA.

Consecutive sentences would be available where a young person was under sentence for an offence when a new sentence involving custody was imposed, or where a young person was found guilty of more than one offence in respect of which the court imposed a term of custody (clause 42(13)).

Consistent with section 20(5) of the YOA, clause 42(17) would provide that a youth sentence imposed on a young person would continue in force after the young person became an adult.

h. Additional Custody Sentences

Clauses 43 to 46 of the bill would deal with the effect of an additional youth sentence of custody imposed for an offence committed prior to the start of a sentence that a young person was already serving.

In such cases, clause 43 would provide that, for the purposes of calculating the total length of the young person's sentence and the respective custodial and community portions (i.e., release under supervision in the community subject to conditions, or conditional supervision), the two sentences would effectively be added into a single custodial sentence deemed to commence at the beginning of the earlier sentence. The new merged sentence would be subject to the limits set out in clause 42(15) above (i.e., ten years, in the case of first degree murder; seven years, in the case of second degree murder; and three years, in all other cases), and the total custodial portion of such a merged sentence would be limited to six years under clause 46.

Clause 44 would provide for the effective extension of the custodial portion of the sentence being served in order to take account of the additional custodial sentence.

Clause 45 would provide for the termination of community supervision and the return to custody, where the custodial portion would be effectively extended by the additional custodial sentence. However, even where the additional custodial sentence did not automatically extend the custodial portion to be served, the provincial director would have the discretion under clause 45(2) to have the young person remanded into custody for a review of the case. Pursuant to clause 45(3), the provincial director would be obliged to do this where the young person had been released under conditional supervision before the end of the custodial portion of the earlier sentence (see clauses 94 and 96 in Part 5). These provisions are intended to ensure that, even

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where an additional custodial sentence did not affect the duration of the sentence already being served, there would still be an opportunity for the responsible officials to revisit the case, since the additional sentence might affect the young person's risk profile.

i. Continuous vs Intermittent Custody

Consistent with YOA section 24.4, clause 47 would provide that, while youth custody sentences would be deemed to be continuous custody, a youth justice court could order a young person to serve the custodial portion of such a sentence on an intermittent (i.e., weekend) basis, provided there was a youth custody facility available that could carry out such a sentence. However, clause 47(2) would amend the law to restrict intermittent custody to cases where the sentence was for 90 days or less. Moreover, intermittent custody would not be available in the case of murder or in any case where intensive rehabilitative custody and supervision was ordered. Clauses 42(2)(q) and (r) above specify that a sentence involving a period of *continuous* custody would have to be imposed in such cases.

j. Reasons for Sentence

Clause 48 would require a youth justice court to provide reasons for the sentence imposed in the record of the case and, on request, to cause copies of the sentence and reasons to be sent to: the young person; the young person's counsel; a parent of the young person; the provincial director; the prosecutor; and, in the case of a custodial sentence, the review board (which would be responsible for conducting reviews on the level of custody in which a young person was to be held – see clause 87). An equivalent provision is found in YOA section 20(6).

k. Non-Application of *Criminal Code* Sentencing Provisions

Consistent with YOA section 20(8), clause 50 would provide that the *Criminal Code* provisions on sentencing (Part XXIII) would not apply in a case where the young person was subject to a youth sentence, except for the following provisions: sections 722, 722.1 and 722.2 (provision for the admission of victim impact evidence); section 730(2) (continuation in force of appearance notice, promise to appear, summons, undertaking, or recognizance in certain situations); and sections 748, 748.1 and 749 (provisions dealing with pardons, remission of sentence, and the royal prerogative of mercy).

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l. Weapons Prohibitions

Clause 51 would provide that, in addition to the youth sentences listed in clause 42(2) above, young persons found guilty of certain offences would, like adults, be liable to court-ordered prohibitions on the possession of weapons, ammunition, explosives, etc. (the offences that would trigger such an order are set out in sections 109(1)(a) to (d) and 110(1)(a) and (b) of the *Criminal Code*). However, the periods specified in clause 51 of the bill for the duration of such orders would be considerably less than the periods applicable to adults under the *Criminal Code* (a maximum, in the case of a discretionary order, or a minimum, in the case of a mandatory order, of two years under the bill; versus a maximum or minimum, as the case might be, of ten years under the Code). Clause 52 would provide for the review of such orders, on application, by the youth justice court. Equivalent provisions are found at sections 20.1 and 33 of the YOA.

m. Allocation of Funds for Victim Assistance

Clause 53 would provide for the direction towards victim assistance of revenue from fines imposed on young persons under clause 42(2)(d). Clause 53(1) would permit the lieutenant governor in council of a province to fix a portion of such fines to be used in providing assistance to victims of offences as he or she might direct. Where a province did not fix the percentage of fines to be diverted to victim assistance, clause 53(2) would provide that a youth justice court imposing a fine could order that the young person also pay a victim fine surcharge of up to 15% of the fine, which would be used to provide such assistance to victims as the lieutenant governor in council of the province might direct.

Pursuant to clause 54(1), before ordering a victim fine surcharge, the court would have to consider the young person's ability to pay. The young person could pay off all or part of a surcharge by performing work in a program established by the province for that purpose (clause 54(2)).

n. Orders with Conditions for Conduct

Clause 55 sets out terms and conditions applicable to probation orders (clause 42(2)(k)) and orders directing a young person into a program of intensive support and

supervision (clause 42(2)(l)). Similar provisions are found in section 23 of the YOA. Such orders would have to include the following conditions, to which the young person would be subject: that the young person would have to keep the peace, be of good behaviour, and appear before the youth justice court when required. The youth justice court could also prescribe any of the following additional conditions requiring the young person to:

- report to and be supervised by the provincial director or a designated person;
- notify the court clerk, provincial director, or youth worker of any change of address or place of employment, education, or training;
- remain within the territorial jurisdiction of the court or courts named;
- make reasonable efforts to obtain and maintain suitable employment;
- attend school or any place of learning, training, or recreation where a suitable program was available;
- reside with a parent or other appropriate adult who was willing to provide for the care and maintenance of the young person;
- reside at a place that the provincial director might specify;
- not to own, possess, or have control of any weapon, ammunition, prohibited ammunition, prohibited device, or explosive substance, except as authorized; and
- comply with any other conditions that the court considered appropriate.

In the case of a deferred custody and supervision order under clause 42(2)(p), the terms and conditions applicable to release on conditional supervision (see clause 105 in Part 5 – Custody and Supervision) would apply.

o. Transfer of Sentences

Clauses 57 and 58 provide for the transfer of youth sentences to other territorial divisions outside the jurisdiction of the sentencing youth justice courts; they would effectively reproduce the provisions of sections 25 and 25.1 of the YOA.

p. Review of Non-Custodial Sentences

Clause 59 would provide for the review of non-custodial youth sentences (i.e., a youth sentence under clause 42(2), other than under clause 42(2)(n), (o), (q) or (r) the youth justice court. Clause 59 would effectively reproduce section 32 of the YOA. The sentence review mechanism would enable the courts to revisit a sentence imposed on a young person and to consider whether it was still appropriate in the circumstances, or whether it should be varied or even terminated.

Review of a non-custodial youth sentence would be available six months after it was imposed – or earlier with leave of a youth justice court judge – on the application of the young person, the young person's parent, the attorney general's office, or the provincial director (clause 59(1)). A sentence review could not take place until the completion of any appeal proceedings in the case (clause 59(5)). To assist in its conduct of a sentence review, the youth justice court could require the provincial director to have a progress report prepared on the performance of the young person since the sentence had gone into effect (clause 59(3)). Such a report could include any information on the personal history, family history, and present environment of the young person that the author of the report considered advisable (clause 59(4)). The provisions governing the distribution and disclosure of pre-sentence reports (see clauses 40(4) to (10)) would apply to progress reports (clause 59(4)).

Pursuant to clause 59(2), the grounds for reviewing a non-custodial youth sentence would be:

- that there had been a material change in the circumstances that led to the imposition of the sentence;
- that the young person was either unable to comply with, or was experiencing serious difficulty in complying with the terms of the sentence;
- that the terms of the sentence were adversely affecting the young person's opportunities to obtain certain services, education, or employment; or
- any other ground that the court considered appropriate.

After conducting the review, and hearing from the parties (i.e., the young person, a parent of the young person, the attorney general, and the provincial director), the youth justice court could either:

a) confirm the original youth sentence;

b) terminate the youth sentence; or

c) vary the original youth sentence or impose a new youth sentence (other than a custodial sentence), provided that the modified sentence was not more onerous than the remainder of the original sentence (unless the young person consented).

5. Adult Sentences

a. Overview

Currently, under the YOA a young person can be subjected to an adult sentence only if the proceedings are transferred to the adult criminal justice system prior to judgment. Transfer of cases to the adult system is dealt with in section 16 of the YOA. The YOA provides for two forms of transfer: the general transfer and the presumptive transfer.

The general transfer mechanism is available only where the young person is at least 14 years of age and is charged with an indictable offence (other than an indictable offence that can only be tried in provincial court). Either the prosecution or the defence can apply to the youth court to have a case transferred to the adult system. Before ordering such a transfer, the court must be satisfied that the goals of public protection and rehabilitation of the young person cannot be appropriately reconciled in the youth system. The party applying for the transfer – usually the Crown prosecutor – has the burden of proof.

In 1995, the YOA was amended to provide for the presumptive transfer of certain cases to the adult system. These are cases where the young person is at least 16 years of age and is charged with murder, attempted murder, manslaughter, or aggravated sexual assault; the matter will proceed in the adult system, unless either the defence or the prosecution can, on an application, persuade the court that the goals of public protection and rehabilitation of the young person can be appropriately reconciled in the youth system. The party applying to prevent the transfer – usually the defence – has the burden of proof.

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Bill C-7 proposes a substantial change from the YOA in this area. The bill would abolish the transfer mechanism altogether and would instead provide for the imposition of adult sentences within the youth criminal justice system. Similar to the general transfer provision in the YOA, the prosecution would be able to apply for an order that a young person was subject to an adult sentence if convicted of an indictable offence punishable (in the case of an adult) by imprisonment for more than two years. The current presumptive transfer mechanism would be converted into a category of offences, called "presumptive offences," upon conviction for which the court would have to impose an adult sentence, unless the young person had successfully applied for an order that a youth sentence should be imposed. At the same time, access to adult sentences would be expanded under the bill. In addition to cases of murder, attempted murder, manslaughter, or aggravated sexual assault, the category of presumptive offences under the bill would be broadened to include young persons found guilty for a third time of any serious violent offence. Moreover, the age at which a young person could be presumed to be liable to an adult sentence would be lowered from 16 to 14 years – although a province could opt to keep the minimum age for this purpose at 16 or set it at any age between 14 and 16 years.

In another change from the YOA, the determination of whether or not a young person would be liable to an adult sentence would be moved to the end of the trial – i.e., after a finding of guilty, but prior to the sentencing hearing. However, any young person facing an adult sentence would be entitled, in non-presumptive cases, to pre-trial notice that the Crown intended to seek an adult sentence, and, in all such cases, to elect to have a preliminary inquiry and a jury trial. The move to a post-adjudicative procedure is expected to be more efficient than the current pre-trial transfer proceedings. Currently, much of the evidence adduced at a transfer hearing must be adduced again at the trial or at the sentencing hearing. Moreover, while a transfer decision is appealed separately, before the trial of the case even begins, an order for or against the imposition of an adult sentence would be appealable only at the end of the trial, as part of the sentence. A post-adjudicative determination is also more consistent with the presumption of innocence.

In proposing to replace the pre-trial transfer procedure with a post-trial determination, the bill is consistent with the recommendations of both the House of Commons

Standing Committee on Justice and Legal Affairs in its 1997 report and the Federal-Provincial-Territorial Task Force on the Youth Justice System.[24]

b. Minimum Age for Presumptive Offences

Clause 61 would enable each province (by order of its lieutenant governor in council) to set an age greater than 14 but not more than 16, as the minimum age at which a young person could be presumptively liable to an adult sentence.

c. Application by Young Person against Adult Sentence

Clause 63 would provide that a young person charged with, or found guilty of, a presumptive offence could, at any time before the commencement of the sentencing hearing, apply to the court for an order that he or she was not liable to an adult sentence and that a youth sentence would have to be imposed. Where no such application was made in such a case, clause 70 would require the youth justice court to inquire whether the young person wished to make such an application before proceeding to sentencing. If the Crown prosecutor gave notice that the young person's application was not opposed, the court would have to make the order.

d. Application / Notice by Attorney General for Adult Sentence

Clause 64 would enable a Crown prosecutor to apply to the court for an order that a young person was liable to an adult sentence in respect of an indictable offence punishable (as against an adult) by more than two years' imprisonment and committed after the young person had attained the age of 14. The application would have to be made after the young person was found guilty, and after any judicial determination under clause 42(9) (above) that the offence was a serious violent offence, but before the commencement of the sentencing hearing. Where the young person gave notice to the court that he or she did not oppose the application for an adult sentence, the court would be required to order that an adult sentence be imposed.

However, where the Crown intended to make such an application or intended to establish that the offence was a presumptive offence, the Crown would have to give notice of that intention to the young person and the youth justice court before the young person entered a

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(24) *Renewing Youth Justice*, p. 65.

plea to the charge, or, with the court's leave, before the commencement of the trial. The Crown would also be required, before a plea was entered, to give an additional notice to the young person that the Crown intended to establish, after a finding of guilty, that the offence was a third serious violent offence and, therefore, a presumptive offence.

With respect to the named presumptive offences of murder, attempted murder, manslaughter, and aggravated sexual assault, no notice would be required. Nor would it be required with respect to any included offence punishable (as against an adult) by more than two years' imprisonment.

Clause 65 would enable the Crown to decline to seek an adult sentence in respect of a presumptive offence. Where the Crown gave notice to this effect, the youth justice court would have to order that the young person, if found guilty, would not be liable to an adult sentence. The court would also have to order a ban on publication of information that would identify the young person as having been dealt with under the bill.

e. Election as to Mode of Trial

Where a young person faced a possible adult sentence, or wherever a young person was charged with murder (see discussion on "Youth Sentence for Murder," above), clause 67 would provide for an election as to mode of trial: no preliminary inquiry and a trial by a youth justice court judge; a preliminary inquiry and a trial by a judge alone; or a preliminary inquiry and a trial by a judge and jury. Such proceedings would generally be governed by the relevant provisions of the *Criminal Code* (i.e., Parts XVIII, XIX, and XX), except where inconsistent with the bill.

Notwithstanding this right of election, clause 67 of the bill would include provisions similar to those in the *Criminal Code* that allow an accused's election of the non-jury options to be overridden in certain circumstances. Clause 67(5) of the bill would effectively permit the court to require a trial by judge and jury with a preliminary inquiry where there were multiple accused who had elected different modes of trial. This provision is essentially the same as section 567 of the *Criminal Code*. Clause 67(6), on the other hand, would permit the Crown prosecutor to override the young person's election and require a jury trial for any reason. This provision is based on section 568 of the *Criminal Code*.

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f. Determination re Liability to Adult Sentence

Before making a determination that a young person was liable to an adult sentence in respect of an offence for which he or she had been found guilty, the court would have to hold a hearing similar to a transfer hearing under section 16 of the YOA.

Clause 71 would require a hearing, unless the application for or against the imposition of an adult sentence, as the case might be, was unopposed. Like section 16(1.1) of the YOA, both the prosecution, the defence, and the accused's parents would have to be given an opportunity to be heard.

The test to be applied in determining an application in respect of adult sentences under clause 72 would be whether or not a youth sentence would be adequate to hold the young person accountable for the offending behaviour, in light of the following factors: the seriousness and circumstances of the offence; the young person's degree of responsibility, age, maturity, character, background, and previous record; and any other relevant factors. While the factors to be taken into account would be similar to those applicable to a transfer application under section 16 of the YOA, the test itself would be different. Section 16(1.1) of the YOA refers to the capacity of the youth system to reconcile the twin objectives of public protection and rehabilitation, but makes it clear that public protection is the paramount concern. The test in clause 72, described above, would not contain any explicit reference to public protection or rehabilitation; however, the impact of the proposed test on outcomes is not immediately apparent.

As with a transfer application, the court would have to consider a pre-sentence report in making a determination under clause 72. Also, the court would, of course, have to give reasons for its decision. Unlike a YOA transfer application decision, however, which must be appealed separately, a decision under clause 72 could be appealed only as part of the ultimate sentence, unless the appeal court ordered otherwise (see also clause 37(4)).

Clause 74 would provide for the applicability of the *Criminal Code* provisions dealing with sentencing (Part XXIII) and dangerous offenders (Part XXIV) to young persons subject to an adult sentence. Where an adult sentence was upheld at the conclusion of any appeal proceedings, or once the time for taking an appeal had expired, clause 74 would convert a "finding of guilt" against a young person into a "conviction."

Where a young person was found guilty of a presumptive offence, but the court decided against imposing an adult sentence, clause 75 would nonetheless in some cases permit the publication of information identifying the young person. This would represent a change from the YOA (see section 38). Publication of such information would be allowed, unless, on an application by the defence or the prosecution, the court was persuaded that the goals of rehabilitation served by suppression of the information outweighed the public interest in publication.

g. Young Person Sentenced to Imprisonment

When an adult sentence of imprisonment was given, clause 76 of the bill would, like YOA section 16.2, leave the court a certain amount of discretion as to the type of correctional facility in which the sentence would have to be served. Clause 76(1) would require the sentencing court to order that the young person serve all or any portion of the sentence in a youth custody facility separate and apart from any adult; a provincial correctional facility for adults; or, if the sentence was for two years or more, a federal penitentiary. Before making its decision, the court would have to have a report prepared and would have to give the following parties and stakeholders an opportunity to be heard: the young person, a parent of the young person, the Crown prosecutor, the provincial director, and representatives of the provincial and federal correctional systems (clauses 76(3) and (4)).

Clause 76 would, however, narrow the discretion of the sentencing court on the issue of placement. Unlike YOA section 16.2, clause 76(2) would presume that: young persons under 18 at the time of sentencing should be placed in a youth custody facility; and those 18 or over at that time should be placed in the applicable type of adult facility (i.e., a provincial institution or federal penitentiary, depending on the length of the sentence). These presumptions could be rebutted where the court was satisfied that the presumptive placement would not be in the best interests of the young person or would jeopardize the safety of others.

Once the deadline for appeals had expired, any of the parties or stakeholders listed above could apply to the youth justice court for a review of the placement decision (clauses 76(6) and (7)). After hearing the other parties and stakeholders, the court could vary its order where it was satisfied that there had been a material change in the circumstances that had resulted in the original placement order (clause 76(6)).

Where a "young person" aged 20 or older, a court making or reviewing a placement order would have to send the person to the appropriate adult facility unless it was satisfied that being in a youth facility would be in the best interests of the young person *and* would not jeopardize the safety of others (clause 76(9)).

Clauses 77 and 78 would ensure that the rules governing conditional release (Part II of the *Corrections and Conditional Release Act*), or earned remission of sentence (section 6 of the *Prisons and Reformatories Act*), as the case might be, applied to any young person serving an adult sentence of imprisonment, notwithstanding the fact that the young person had been placed in a youth facility for all or a portion of the sentence.

Despite the foregoing, clauses 79 and 80 would provide that a person given an adult sentence of imprisonment under the bill: if subsequently sentenced to imprisonment under another federal Act (e.g., the *Criminal Code*), would have to be transferred to an adult facility; and, if already serving such a sentence, would have to remain in an adult facility.

6. Effect of Termination of Youth Sentences

Clause 82 of the bill would relieve a young person who had received a youth sentence from certain consequences of being found guilty of a criminal offence. Like section 36(1) of the YOA, clause 82(1) would provide that, where a young person found guilty of an offence received an absolute discharge, or where any other youth sentence imposed in respect of the offence had been completed or terminated, the young person would be deemed not to have been found guilty of the offence. Unlike the corresponding YOA provision, however, the benefit of clause 82(1) would extend to persons who were still subject to a weapons prohibition order under clause 51 above, or section 20.1 of the YOA. Clause 82(2) would further provide that the completion or termination of a youth sentence would remove any disqualification to which the young person might be subject under federal legislation by reason of having been found guilty of the offence. Moreover, clause 82(3) would prohibit the use of any job application form in the federal public sector or in any federally regulated business that required disclosure of a finding of guilt under the bill in respect of an offence for which the youth sentence had been completed or terminated. Clauses 82(2) and (3) offer similar benefits to those available through a pardon under the *Criminal Records Act* (see sections 5(b) and 8).

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A number of exceptions and qualifications would apply to the general provision in clause 82(1) whereby a young person who had completed his or her youth sentence would be deemed not to have been found guilty of the offence. First of all, clause 82(1) would be subject to section 12 of the *Canada Evidence Act*. In other words, a young person who was deemed not to have been found guilty of an offence under clause 82(1) and who subsequently appeared as a witness in a proceeding could still be questioned on that finding of guilt as a matter of credibility. The previous finding of guilt would also be available for use in subsequent proceedings respecting the young person. It would be available as a basis for an argument of double jeopardy (e.g., a plea of *autrefois convict*, or previously convicted) in response to any further charge relating to the offence (clause 82(1)(a)). A youth justice court could take such a finding of guilt into account in considering an application for or against the imposition of an adult sentence (clause 82(1)(b)). A court could also make use of the finding of guilt in considering an application for judicial interim release or in determining the appropriate sentence to impose for an offence (clause 82(1)(c)). Also, the National Parole Board or any provincial parole board could use such a finding of guilt in considering an application for conditional release or a pardon (clause 82(1)(d)).

According to clause 82(4), a finding of guilt under the bill would not constitute a previous conviction for the purposes of any federal offence for which a greater punishment was prescribed by reason of a previous conviction, except: for the purposes of determining that an offence was a presumptive offence (an offence for which it is presumed that an adult sentence should be imposed – see part (b) of the definition of "presumptive offence" in clause 2(1) of the bill) – or for determining the adult sentence to be imposed on a young person. These exceptions would constitute a change from the corresponding YOA provision (s. 36(5)).

F. Part 5: Custody and Supervision

1. Purpose and Principles of Youth Custody and Supervision

a. General Purpose and Principles

Clause 83(1) of the bill would declare that the purpose of the youth custody and supervision system is to contribute to the protection of society by carrying out youth sentences involving custody and supervision in a safe, fair, and humane manner; and assisting young

persons in their rehabilitation and reintegration into the community as law-abiding citizens, through the provision of effective programs both in custody and during supervision in the community. Clause 83(2) sets out the following principles to be used in achieving this purpose (in addition to those set out in the bill's Declaration of Principle in clause 3):

- the use of the least restrictive measures, consistent with the protection of the public, personnel working with the young person, and the young person himself or herself;
- acknowledgement that, except as necessarily curtailed as a consequence of a sentence under the bill or any Act of Parliament, young persons sentenced to custody would retain the rights of other young persons;
- the involvement of the families of young persons and members of the public should be facilitated;
- custody and supervision decisions should be made in a fair and forthright manner, and the young person should have access to an effective review procedure; and
- the placements of young persons when treated as adults should not disadvantage them with respect to release conditions or eligibility.

b. Separation of Youth from Adult Offenders

Clause 84 would require that young persons committed to custody be held separate and apart from any adult, subject to certain specified exceptions. These exceptions would recognize that young persons subject to custody should not always be held separate and apart from any adult because:

- in the case of youth who are to be detained prior to sentencing, it might be unsafe (for themselves or others) to detain them in a youth facility, or such a facility might be too far away from the young person's home and family (see clause 30(3));
- some "young persons" under the bill could, in fact, be adults at the time of sentencing, or could become adults while in youth custody (see clauses 76, 89, 92 and 93);
- certain young persons, even though they were still under 18, might merit an adult sentence of imprisonment and, with regard to the best interests of such young persons and the safety of others, it would not be appropriate to place them or keep them in a youth facility (see clauses 76, 92(4) and 92(5)); and, at the same time,

- with regard to the best interests of the offender or the safety of others, it is not always necessary or appropriate that every person subject to a custodial sentence under the future YCJA who is or who becomes an adult should necessarily be sent to an adult facility (e.g., the person could be a low-risk inmate with only a short sentence to be served) (see clause 76).

The bill would enhance the separation of youth and adult offenders, however, by narrowing the discretion of the youth justice court in the placement of persons age 18 or over who received a custodial sentence under the bill. There would be a new presumption that any person 18 or older who received an *adult sentence* of imprisonment under the bill would go to an adult facility (clause 76(2)(b)). There would be an even stronger presumption to this effect where this person was 20 or older (clause 76(9)). Moreover, a person who was 20 or older when he or she received a *youth sentence* of custody would have to be placed in an adult facility, without exception (clause 89).

The increased emphasis on the principle of separating adult and young offenders is aimed at enhancing compliance with article 37(c) of the UN *Convention on the Rights of the Child*, which requires states to ensure that every child deprived of his or her liberty according to law is separated from adults, unless to do otherwise is considered to be in the child's best interest. While Canada is a party to this Convention, it has reserved the right not to detain children separately from adults "where this is not appropriate or feasible."

2. Level of Custody

Once a young person had been committed to custody, it would be up to the provincial director to determine the level of custody in which he or she would be held in accordance with clause 85. Clause 85 would require provinces to offer at least two levels of custody, distinguished by the degree of restraint. In determining or redetermining the appropriate level of custody, the provincial director would have to take the following factors into account:

- the need to impose the least restrictive level of custody, having regard to:
  - the seriousness of the offence and the circumstances in which it was committed;
  - the needs and circumstances of the young person, including proximity to family, school, employment, and support services;
  - the safety of other young persons in custody; and

- the interests of society;

- the need for the level of custody to allow for the best possible match of programs to the young person's needs and behaviour, having regard to the findings of any assessment of the young person; and

- the likelihood of escape.

Clause 86 would require the provincial government to ensure that due process was observed in making a determination or redetermination under clause 85. Specifically, the young person would have to be provided with any relevant information to which the provincial director had access in making the determination; given the opportunity to be heard; and informed of the right to a review under clause 87. Clause 85(7) would require the provincial director to have written notice of a determination or redetermination of the level of custody, including reasons, sent to the young person and his or her parent.

Under clause 87, the provincial government would be required to ensure that procedures were in place for the review of any determination or redetermination under clause 85 before an independent board. The above factors and due process requirements applicable to a determination or redetermination by the provincial director would apply to a review by the review board, whose decision would be final.

Where a province preferred to have the level of custody determined judicially rather than administratively, clause 88 would permit the provincial government to confer on the youth justice court the authority to make the clause 85 determination. In such a case, various provisions of the current YOA would apply, with any necessary modifications.

While the criteria for determining the level of custody would remain the same as under the YOA (see section 24.1(4)), the bill would, contrary to the YOA, presume an administrative procedure for the decision. Currently, the YOA provides that the youth court is to make this determination, unless the province designates that the provincial director is to do so (see section 21.4). Another change from the YOA would be that the provinces would have more freedom in designating the types of youth facilities to which young persons could be committed. Currently, section 24.1 of the YOA stipulates that youth custody facilities are either "open custody" – meaning a community residential centre, group home, child care institution, forest or wilderness camp, or any like facility – or "secure custody," meaning a place or facility of secure

containment or restraint. Bill C-7, in clause 85, would require only that provinces offer more than one level of restraint.

There would also be some changes in the procedure itself. In clause 86, the bill would add specific rights of due process to be observed by the provincial director in determining the level of custody. Under clause 87, however, a parent of the young person would no longer have an independent right to apply for a review of a level of custody determination (see YOA section 28.1(1)), and a decision by a review board would no longer be subject to a further review by the youth court (see YOA section 31).

3. Persons Age 20 or over at Time of Sentencing

When a person was aged 20 or older at the time a custodial youth sentence was imposed, clause 89 would require that he or she be committed, at least initially, to a provincial correctional facility for adults.[25] Once such a person had served some time in a provincial adult facility, the provincial director could apply to the youth justice court for an authorization to direct that the person serve the remainder of the youth sentence in a federal penitentiary, provided that there were two years or more remaining in the sentence. The young person, the provincial director, and representatives of the provincial and federal correctional systems, would all have to be given an opportunity to be heard on such an application, and the court would have to be satisfied that transfer to a penitentiary would be in the best interests of either the person or in the public interest.

A person serving a youth sentence in an adult facility would be subject to the legislation governing other prisoners in those facilities (in the case of a provincial correctional facility, the *Prisons and Reformatories Act*, and, the case of a federal penitentiary, the *Corrections and Conditional Release Act*), except to the extent that these conflicted with the provisions of Part 6 of the bill (access to youth records, disclosure of information in youth records, etc.). Corresponding amendments to those Acts are proposed in clauses 171, 173, 196 and 197 of the bill.

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(25) Ironically, if such a person was sentenced as an adult, there would still be some discretion to place him or her in a youth facility, although there would be a strong presumption against it (see clause 76(9)).

4. Youth Workers

Clause 90 deals with youth workers and their role in assisting in the young person's reintegration into the community. Clause 90(1) would require the provincial director to designate a youth worker to work with the young person as soon as he or she was sentenced to custody. During the custodial portion of the sentence, the youth worker would prepare and implement a plan setting out the most effective programs for the young person's reintegration into the community. When the young person was serving part of the sentence in the community, clause 90(2) (similar to YOA section 37(a.1)) would require the youth worker to supervise the young person, continue to provide support, and help the young person to respect the conditions of his or her release and to implement the reintegration plan.

5. Reintegration Leave

Clause 91 would provide for the provincial director to grant "reintegration leave" to any young person committed to a youth custody facility in the province in respect of a youth sentence or an adult sentence. Section 35 of the YOA makes similar provision for "temporary release from custody." Reintegration leave would be available on any terms and conditions that the provincial director considered desirable:

- for a period of up to 30 days (renewable on reassessment of the case), with or without escort, for medical, compassionate, or humanitarian reasons, or for the purpose of rehabilitating the young person or reintegrating him or her into the community; or

- on the days and during the hours specified by the provincial director, in order that the young person might:
  - attend any educational or training institution;
  - obtain or continue employment, or perform domestic or other family duties;
  - participate in a specified program that, in the provincial director's opinion, would enhance the young person's employment, educational, or training potential; or
  - attend an out-patient treatment program or other program that addressed the young person's needs.

The provincial director could, at any time, revoke any such leave. Where this occurred, or where the young person failed to comply with any term or condition of the leave, the young person could be arrested without warrant and returned to custody.

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6. Transfer / Placement into Adult Facility

Clauses 92 and 93 deal with the transfer and placement into adult facilities of certain young persons subject to custodial youth sentences. Clause 76 of the bill addresses the placement of young persons who received adult sentences of imprisonment under the bill. Clause 89 deals with the placement of young persons who had attained the age of 20 when they were given a custodial youth sentence. Clauses 92 and 93 deal with situations where young persons who were subject to custodial youth sentences were to be transferred to, or placed in, adult facilities because they reached a certain age while in a youth facility, or because they were also subject to a non-youth sentence of imprisonment (i.e., an adult sentence under the bill, or a sentence under other legislation).

Under clause 92(1), a young person who was subject to a custodial youth sentence could be sent to an adult facility by the youth justice court, on the application of the provincial director made any time after the young person had attained the age of 18. The court would first have to give the young person, the provincial director, and representatives of the provincial correctional system an opportunity to be heard, and the court would have to be satisfied that the transfer was in the best interests of the young person or in the public interest. The transfer would be to a provincial facility for adults; however, if two years or more remained in the sentence, the provincial director could, under clause 92(2), make a further application to the court for the young person's transfer to a federal penitentiary. The provincial director would have to wait until the young person had served some time in the provincial adult facility, and the court would have to allow representatives of the federal correctional service to be heard, in addition to the parties listed above in respect of the initial transfer from youth custody.

Clause 92(4) would provide that a young person would have to serve a custodial youth sentence in an adult facility where he or she was also subject to another sentence that had to be served in an adult facility (i.e., an adult sentence of imprisonment under the bill in respect of which the youth justice court made an adult placement order under clause 76; or a sentence of imprisonment under another Act).

Clause 92(5) would give the provincial director the discretion to order the transfer, to an adult facility of a young person sentenced to a custodial youth sentence where he or she was already serving an adult sentence of imprisonment in a youth facility under clause 76.

Where a young person turned 20 while serving a custodial youth sentence in a youth facility, clause 93(1) would require his or her transfer to a provincial adult correctional facility, unless the provincial director ordered otherwise. Where a young person was so transferred, clause 93(2) would enable the provincial director to apply, on the same basis and through the same procedure as clause 92 above, for the young person's further transfer to a federal penitentiary where two years or more remained in the sentence.

Pursuant to clauses 92(3) and 93(3), young persons transferred to an adult facility under clauses 92(1), 92(2), 93(1) or 93(2) above would be subject to the legislation governing other prisoners in those facilities (in the case of a provincial correctional facility, the *Prisons and Reformatories Act*, and, the case of a federal penitentiary, the *Corrections and Conditional Release Act*), except to the extent that it conflicted with the provisions of Part 6 of the bill (access to youth records, disclosure of information in youth records, etc.). Young persons sent to an adult facility under clause 92(4) and (5) would already be subject to the *Prisons and Reformatories Act* or the *Corrections and Conditional Release Act*, as the case might be, as a result of clause 77(2) and the consequential amendments to those Acts in clauses 171, 173, 196 and 197.

7. Review of Custodial Youth Sentences and Early Release

a. Introduction

Notwithstanding the imposition of a youth sentence involving a specified period of custody under clause 42(2)(n), (o), (q), or (r), a custodial youth sentence served in a youth facility would be subject to review under clauses 94 and 96. Like sections 28 and 29 of the YOA, clauses 94 and 96 would provide for the review of such sentences by the youth justice court, after which, the court could order the young person's release under conditional supervision where the court decided that his or her continued detention was no longer necessary.

Unlike persons serving a sentence in an adult correctional facility, or young persons given an adult sentence of imprisonment under the bill, young persons serving a youth sentence in a youth facility are not eligible for parole or remission of sentence. Unless these young persons were granted early release through a review under cla ses 94 or 96 of the future YCJA (or, currently, sections 28 and 29 of the YOA), they would have to remain in custody until: the end of the two-thirds custodial portion of the sentence, in the case of an order under

clause 42(2)(n); or the end of the specified term of custody, in the case of an order under clause 42(2)(o), (q), or (r).

Sentence reviews under clauses 94 and 96 would be conducted by the youth justice court. The basis for a clause 94 review would be a change in circumstances justifying a reappraisal of the sentence. A review under clause 96 would be triggered by a recommendation from the provincial director.

b. Review of Custodial Youth Sentences

Clause 94(1) and (2) would provide for the annual review of custodial youth sentences that exceeded one year. Clause 94(3) would provide for the optional review of youth custody sentences at earlier intervals: in the case of a youth sentence not exceeding one year, it would be after either 30 days from the date of sentencing or one-third of the youth sentence, whichever was greater; where the youth sentence was for more than a year, it would be after six months from the date of the last sentence imposed in respect of the offence. Review of a custodial youth sentence by the youth justice court at these intervals would be dependent on an application by the young person, the young person's parent, the attorney general, or the provincial director, citing any of the grounds for review (see below). Moreover, clause 94(4) would provide that the young person could be brought before the youth justice court for a review at any other time, with leave of a youth justice court judge.

The youth justice court would review a custodial youth sentence when it was satisfied that this was justified on any of the following grounds (clauses 94(5) and (6)):

- that the young person had made sufficient progress to justify a change in the youth sentence;
- that the circumstances that led to the sentence had changed materially;
- that new services or programs were available that had not been available at the time of sentencing;
- that the opportunities for rehabilitation were now greater in the community; or
- on any other ground that the court considered appropriate.

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To assist it in conducting the review, the court would require the provincial director to have a progress report prepared assessing the performance of the young person since the sentence began (clause 94(9)). The court would also have to give the young person, a parent of the young person, the attorney general, and the provincial director, an opportunity to be heard (clause 94(19)).

Having conducted a sentence review, clause 94(19) would provide that the youth justice court could, having regard to the needs of the young person and the interests of society:

- confirm the sentence;
- release the young person under conditional supervision (see below); or
- if the provincial director recommended it, convert a sentence of intensive rehabilitative custody and supervision under clause 42(2)(r) to a sentence of custody and supervision under clause 42(2)(n) or (o), or custody and conditional supervision under clause 42(2)(q), as the case might be.

The conditions applicable to early release on conditional supervision would be the same as those applicable to conditional supervision under clause 105 at the end of the custodial portion of a youth sentence of custody and conditional supervision (for murder) or of intensive rehabilitative custody and conditional supervision (for a presumptive offence, where there is a psychological or emotional disorder) (see below).

A review under clause 96 would be similar to one under clause 94, except that it could only be triggered through a recommendation from the provincial director and would not be restricted to any timeframe or require the leave of the court.

There could be no review of a sentence under either clause 94 or clause 96 if the sentence was under appeal (clauses 94(7) and 96(4)).

c. Review of Other Orders

Under clause 95, certain other decisions could be reviewed as sentences under clause 94: the imposition of additional conditions of supervision or conditional supervision (see below, clauses 97(2) and 105(1)); a decision by the youth justice court to detain the young person beyond the custodial portion of the sentence (see below, clauses 98(3) and 104(1)); and

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the cancellation of a young person's supervision or conditional supervision in the community as a result of a breach of conditions (see below, clauses 103(2)(b) and 109(2)(b)).

8. Release on Completion of the Custodial Portion

a. Conditions for Supervision

In a youth sentence of custody and supervision under clause 42(2)(n), the last third of the sentence would be served in the community under supervision with a series of conditions automatically applied during that period (clause 97(1)). These conditions would be the same as those in section 26.2(2) of the YOA. The young person would be required to:

a) keep the peace and be of good behaviour;

b) report to the provincial director and be under his or her supervision;

c) inform the provincial director immediately on being arrested or questioned by police;

d) report to the police or any named individual, as instructed by the provincial director;

e) advise the provincial director of the young person's address of residence, and immediately report any change
   i. in that address,
   ii. in the young person's occupation, employment, training, education, or volunteer work,
   iii. in the young person's family or financial situation, and
   iv. that was likely to affect the young person's ability to comply with the conditions of the sentence; and

f) not own, possess, or have control over any weapon, ammunition, explosive, etc.

In addition, clause 97(2) would enable the provincial director to set any additional conditions that would address the needs of the young person, promote the young person's reintegration into the community, and adequately protect the public. In doing so, the provincial director would have to take into account the needs of the young person, the nature of the offence, and the young person's ability to comply with the conditions.

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b. Conditions for Conditional Supervision

The application of conditions to young persons being released on conditional supervision at the end of the custodial portion of a youth sentence under clause 42(2)(q) (murder) or clause 42(2)(r) (intensive rehabilitative custody and supervision) are discussed in clause 105. The young person would be brought before the youth justice court one month before the end of the custodial portion of the sentence and the court would, after a hearing, set the conditions for the young person's conditional supervision. The court would be assisted in doing so by a report on the case prepared and submitted by the provincial director.

Clause 105(2) sets out a series of mandatory conditions, while clause 105(3) would provide for various discretionary conditions that the court could impose. The conditions would be the same as those currently applicable under section 26.2 of the YOA. The mandatory conditions would include all those set out in the preceding section as applicable to supervision under clause 97(1) (above). In the case of *conditional* supervision, however, a young person would also be automatically required to comply with any reasonable instructions attached by the provincial director to prevent a breach of a condition or to protect society (see clause 105(2)(h)). The additional conditions that the youth justice court could impose under clause 105(3) would be that the young person

a) on release, go directly to his or her place of residence or to any other place;

b) make reasonable efforts to obtain and maintain suitable employment;

c) attend any appropriate place of learning, training, or recreation, if the court was satisfied that a suitable program was available there for the young person;

d) reside with a parent or other appropriate adult who was willing to provide for the care and maintenance of the young person;

e) reside in any place that the provincial director might specify;

f) remain in the territorial jurisdiction of one or more courts named in the order; and

g) comply with any other condition set out in the order that the court considered appropriate, including conditions for securing the young person's good conduct and preventing his or her reoffending.

Under clause 42(2)(p), the foregoing provisions dealing with conditions applicable to conditional supervision would be applicable to a deferred custody and supervision order.

Pursuant to clause 105(8), the youth justice court's order setting a young person's conditions for release on conditional supervision could be reviewed by the court of appeal on an application by the young person or the provincial director.

9. Detention beyond the Custodial Portion

a. Application by Provincial Director

Although, according to clause 42(2)(n), (o), or (r) a portion of the term of a youth sentence would be spent under supervision or conditional supervision in the community, young persons could in certain cases be detained longer, up to the end of the full term of their sentences. Similar provisions are available in the adult system under the *Corrections and Conditional Release Act* for the detention of federal prisoners during their statutory release period.

Under clause 98, the provincial director could apply to the youth justice court to make such an order, where the provincial director, the young person, and a parent of the young person had an opportunity to be heard, and where the court was satisfied that there were reasonable grounds to believe that:

- the young person was likely to commit a serious violent offence before the expiry of the sentence; and
- conditions would not be adequate to prevent the commission of the offence.

In making this determination, the court would have to consider any relevant factor, including:

a) evidence of a pattern of persistent violent behaviour and, in particular,
   i. the number of offences committed by the young person that caused harm to another person,
   ii. difficulties in controlling violent impulses to the point of endangering the safety of others,
   iii. the use of weapons in the commission of any offence,
   iv. explicit threats of violence,
   v. brutal behaviour associated with the commission of an offence, and

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vi. a substantial degree of indifference to the consequences for others of the young person's behaviour;

b) psychiatric or psychological evidence that, as a result of a physical or mental illness or disorder, the young person was likely to commit a serious violent offence before the expiry of the sentence;

c) reliable information that satisfied the youth justice court that the young person was planning to commit a serious violent offence before the end of the sentence;

d) the availability of adequate supervision programs in the community for the protection of the public;

e) any increased likelihood that the young person would reoffend if he or she served the entire sentence in custody; and

f) evidence of a pattern of committing offences against the person while on supervision or conditional supervision in the community.

In making its determination, the youth justice court would have the benefit of a report that the provincial director would have to have had prepared and submitted (clause 99).

b. Application by Attorney General

Under clause 104, a similar order could be obtained on the application of the attorney general, but only in the case of youth sentences under clause 42(2)(q) (murder) or 41(2)(r) (intensive rehabilitative custody and supervision). The applicable provisions are drawn from section 26.1 of the YOA. The process would be similar to that described above with respect to an application by the provincial director. However, the test would be that the young person was likely to commit an offence causing death or serious harm to another person before the end of the sentence. Moreover, in a clause 104 application, the court would not need to consider factors e) and f) above under clause 98 (see above).

c. Review of Order by Court of Appeal

An order by the youth justice court under clause 98 or 104, detaining a young person beyond the custodial portion of his or her youth sentence would be reviewable, on application, by the court of appeal (clause 101).

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10. Breach of Conditions

Clauses 102, 103, and 106 to 109 deal with situations where young persons released into the community for a portion of a custodial youth sentence have violated the conditions of their release. The provisions are similar to those in sections 26.3 to 26.6 of the YOA. Unlike the YOA, however, the provisions of the bill cover two distinct scenarios: where there was a breach of a condition of supervision imposed under clause 97; and where there was a breach of a condition of conditional supervision imposed under clause 105. There is considerable overlap among these provisions.

The provincial director, where he or she had reasonable grounds to believe that a young person had breached, or was about to breach, a condition of his or her supervision imposed under clause 97, could, in writing: (a) permit the young person to continue to serve the sentence in the community on the same or different conditions; or (b) if satisfied that the breach was serious and increased the risk to public safety, order that the young person be remanded to custody until a review was conducted (clause 102).

Clause 106 would make similar provision for cases involving a breach, or potential breach, of a condition of conditional supervision. Here, the provincial director would, at least initially, have to suspend the conditional supervision and remand the young person into custody.

Once the young person had been apprehended and remanded into custody, clauses 102(2) and 108 would require the provincial director to review the case without delay and, within 48 hours, either cancel the order remanding the young person to custody pending a review (in a case of conditional supervision, cancel the suspension of the supervision), or refer the case to the youth justice court.

After giving the young person an opportunity to be heard, the youth justice court, if it was not satisfied that the young person had breached, or was about to breach, the conditions of his or her supervision, could order that the young person continue the supervision portion of the sentence on the same or different conditions (clause 103(1)(a)). If, however, the court was satisfied that the young person had breached, or was about to breach, one of his or her conditions, it would have to: a) vary or replace the young person's supervision conditions; or, b) if satisfied that the breach was serious, order that the young person remain in custody for a

period not exceeding the remainder of the sentence (clause 103(1)(b) and (2)). Clause 109 would make similar provision for cases involving conditional supervision but, unlike a case of supervision (see clause 103(1)(a)), the court could not vary the conditions unless it was satisfied that there was, or would have been, a breach of the conditions (see clause 109(1)).

The foregoing provisions governing breaches of conditional supervision apply to breaches of deferred custody and supervision orders under clause 42(2)(p). Where a youth justice court approves the suspension of supervision in respect of a deferred custody and supervision order, the order is effectively converted to a sentence of custody and supervision (clause 109(2)(c) and (3)).

An order made by the youth justice court as a result of a finding that there had been a breach of a condition could, on application, be reviewed by the court of appeal under clause 101.

G. Part 6: Publication, Records and Information

1. Introduction

Part 6 would maintain the current approach of protecting the identities of young persons involved with the criminal justice system, while broadening the circumstances in which their names could be published. At present, the rule of confidentiality under the *Young Offenders Act* prevails in most cases, except where a young person has been transferred to adult court. Youth court judges can permit short-term publication of the name of a young person who is at large and a danger to others, where such publication might assist in his or her apprehension. A young offender's identity can also be made known to school officials where necessary to protect staff or students.

The changes proposed in this Part would adjust the circumstances in which it would be permissible to publish information about youths involved with the criminal justice system. The names of all youths who received adult sentences could be published, as could the names of those given youth sentences for presumptive offences; in the latter case, judges would have discretion to order that a young person's name not be made public. Importantly, the provisions permitting publication would apply to youths who were being sentenced, thereby extending the prohibition against publication for youths accused but not convicted of offences.

Under the YOA, publication of information about a young offender is permitted as soon as the trial has been transferred to adult court.

The changes in the area of keeping and disclosing records would be consistent with the policy of treating young persons who commit the most serious offences in the same way as adult offenders. Under the bill, the records of youth who received adult sentences would be treated in the same way as are the records of adult offenders. Youth records, as is the case under the YOA, would have a limited existence, in keeping with the goal of promoting the rehabilitation of young persons convicted of youth crime. The bill would also clarify details of the record-keeping system for youth records, and set out procedures by which authorized individuals - such as police officers, victims and school authorities - could access youth records.

2. Protection of Privacy of Young Persons

Clause 110(1) of Bill C-7 would, subject to exceptions, prohibit the publication of the name of or other information about a young person that would identify him or her as a young person dealt with under the Act. Subsections (2) to (6) would spell out the circumstances in which the name of such a young person could be published.

Clause 110(2) would permit the publication of information about a young person who was subject to an adult sentence, as section 38(1) of the YOA does with respect to a young offender who has been transferred to adult court. Unless a publication ban were ordered under clause 65 or 75, clause 110(2) would permit the publication of information about a young person subject to a youth sentence for a presumptive offence. Note that clause 75 of the bill, discussed above, would permit a youth justice court to order a ban on publication in cases involving presumptive offences. Clause 65 would require the youth justice court to order a publication ban where the Attorney General decided to seek a youth sentence in the case of a clause 2(1)(a) presumptive offence (murder, attempted murder, manslaughter or aggravated sexual assault).

The discretion to allow publication of the names of youths subject to youth sentences for presumptive offences would represent a change from the current provisions of the YOA, under which young offenders' names are generally made public only when their cases are transferred to adult court.

Information about the young person could also be published under clause 110(2)(c) if it was done in the course of the administration of justice, and not simply to make the

information known in the community. This limitation is currently in place under section 38(1.1) of the YOA.

Upon reaching the age of 18, young persons whose privacy had been protected by clause 110(1) and who were not still in custody could publish information about themselves (clause 110(3)). This is consistent with the policy aim of the general prohibition on publication, which is to protect the young offender from the stigma of publication. Once they reached adulthood, youths dealt with under the Act could choose to make information about their own lives public, provided they were not still in custody. This qualification is intended to prevent young persons from using publication to build up a criminal reputation while in a youth facility. Young persons (under 18) who would otherwise be protected from publication by clause 110(1) could apply under clause 110 (6) for an order permitting them to publish identifying information about themselves. To make such an order, the court would have to be satisfied that the publication would not be contrary to the young person's, or the public, interest.

Under clause 110(4), police officers could apply for orders permitting the publication of identifying information about young persons when necessary to apprehend a youth who posed a danger to others. Such orders would be limited to five days under clause 110(5). This provision would seem consistent with the Standing Committee's recommendation that youth court judges be given discretion to allow the general publication of the name of a young offender in circumstances where persons were at risk of serious harm and where, for safety reasons, the public interest required it (Recommendation 13). A similar power applies under section 38(1.2) of the YOA, subject to a two-day limitation period.

Clause 111(1) would continue the prohibition under the YOA against publication of information that would identify any child or young person as a victim of an offence by a young person, or as a witness in connection with such an offence. The child or young person thus protected could publish the relevant information after reaching the age of 18 (clause 111(2)(a)). Such information could also be published by, or with the consent of, the parents of a young person who is under 18 or deceased (clause 111(2)(b) and (c). Before age 18, such a child or young person could also apply to the youth justice court, under clause 111(3), for an order permitting publication of the information. This request could be granted if the court were satisfied that this would not be contrary to the child or young person's interest, or to the public interest.

Clause 112 would provide that, once information had been published under clause 110 or 111, it would no longer be subject to a ban on publication under either clause. This provision is necessary because information that has been published becomes generally known, so that there is no longer any policy reason to prohibit its publication. Once a young person had identified him or herself as a young offender, victim or witness, this provision would permit others to publish information or commentary about the disclosure.

3. Fingerprints and Photographs

Clause 113 clarifies that the *Identification of Criminals Act* applies to young persons, so that their fingerprints and other measurements could be taken only in accordance with that Act. This clause is consistent with section 44 of the YOA.

4. Records That Might Be Kept

Under clause 114(1), the records of a youth justice court, review board or any court dealing with proceedings under Bill C-7 would be records subject to Part 6 of the bill. Any police force involved in the investigation of an offence by a young person would be permitted to keep records related to the offence under clause 115(1) (as they currently may under section 42 of the YOA), which would be subject to this Part (clause 115(1)). Where a young person was charged with an indictable offence, to which the *Identification of Criminals Act* applies, records including fingerprints or other measurements under that Act could be provided to the RCMP. If the youth was convicted, such records would have to be provided to the RCMP, under clause 115(2). The RCMP would be required under clause 115(3) to keep records received under that clause. Clauses 115(2) and (3) are consistent with section 41 of the YOA.

Clause 116, dealing with government and private records, would replace section 43 of the current legislation, to reflect changes proposed in the bill, such as the replacement of "alternative measures" by "extrajudicial measures." The only additional element would be the inclusion of a provision authorizing government departments or agencies to maintain records obtained for the purpose of administering orders under the *Firearms Act* or sections 810-810.2 of the *Criminal Code* (which deal with sureties to keep the peace, or "peace bonds"). Records subject to this Part would be all those records relating to offences by young persons that are kept

by government departments or agencies, and those kept by professionals and organizations for the administration of extrajudicial measures or a sentence.

5. Access to Records

Under clause 117, once any applicable appeal period had expired, records relating to offences resulting in adult sentences would be dealt with as adult records and the special protections afforded youth records by clauses 118 to 129 of the bill would not apply. This is consistent with the YOA, under which records of youths transferred to adult court are treated like adult records. Where an adult sentence was imposed, the finding of guilt by the youth justice court would be deemed to be a conviction for the purposes of the *Criminal Records Act* (clause 117). Under the *Criminal Records Act*, records are sealed only by the granting of a pardon.

As is the case under the YOA, clause 118(1) would provide that youth records, meaning all young persons' records except those that had resulted in adult sentences, would be inaccessible except as permitted under the bill. Records would be defined under clause 2 of the bill as any thing containing information that was created or kept for the purposes of the bill or for the investigation of an offence that was or could be prosecuted under the bill. The prohibition against providing access to youth records would not apply as between persons employed in keeping or maintaining such records (clause 118(2)).

Clause 119(1) would establish a list of persons who would be given access to court records and could be given access to police, government and other records. Access would be particularly limited with respect to records of warnings, cautions and referrals, medical or psychological reports, pre-sentence reports and DNA analysis. Clause 119(2) would specify the period during which such access could be granted, which would be a function of the verdict, the severity of the offence and the manner of prosecution, and whether other offences were committed during the period. If a new offence were committed during the access period, the period would start running again, with the record of the first offence being accessible throughout the period in which the record of any subsequent offence was accessible. These provisions are substantially similar to sections 44.1 and 45(1) of the YOA.

Further proposed limitations on access to youth records are set out in clause 119(3) to (10). Access to records regarding extrajudicial measures would be restricted under

clause 119(4). Further restrictions on access to medical and psychological assessments, DNA analysis, and pre-sentence reports would be set out in clause 119(5) and (6). Access to records would not necessarily make them admissible in evidence (clause 119(7)); this would reflect section 44.1(3) of the YOA. Records made available for research purposes could be disclosed in ways that did not identify the young persons involved (clause 119(8)). If a subsequent offence was committed after the young person had become an adult, and before the period of accessibility of the youth record had expired, then the youth record would be treated as an adult record and would be subject to the *Criminal Records Act* (clause 119(9)).

Clause 120 would provide for the RCMP central registry to retain records for an additional period, and to allow even more limited access to them than during the access period under clause 119. There would be a distinction between offences listed in the Schedule to the bill, including some of the most serious offences in the *Criminal Code*, and other offences, with records relating to offences set out in the Schedule and presumptive offences being accessible for longer periods of time and to a broader list of persons. Records relating to presumptive offences could be kept in the RCMP registry indefinitely.

In relation to the records-keeping clauses, 119 and 120, clause 121 would provide that if the Crown failed to make an election in relation to a hybrid offence, that offence would be deemed to be a summary conviction offence. This would be identical to the effect of the current section 45(5) of the YOA.

Under clause 123, there would be access to records after the expiry of the access periods set out in clauses 119 and 120 for administration or research purposes, on the order of a youth justice court judge. Clause 124 would clarify that young persons, and their counsel, would have access to their own records at any time, so long as the records existed.

The circumstances in which certain records could be disclosed by specific persons, including police officers, the Attorney General and youth workers, for a variety of specific purposes are set out in clause 125. These purposes would include criminal investigations, disclosure to a co-accused, extradition proceedings, and the preparation of reports. Clause 125(6) would permit disclosure to professionals or schools involved in the care or supervision of a young person where necessary for compliance with a probation or supervision order, to ensure safety of others, or to facilitate the young person's rehabilitation. Disclosure

under clause 125 could be made only within the period of access to the records set out under clause 119(2).

A youth justice court could order the disclosure of information necessary to warn a specified person or persons about a danger posed by a young person who had been convicted of an offence involving serious personal injury (clause 127). Unless the young person could not be located, he or she would be given an opportunity to be heard on the application. Again, such an order would be subject to the applicable access period in clause 119(2).

Clause 128 would regulate access to and disposal of records after the expiration of the access period. At such time, the records could be destroyed or transmitted to the National Archivist for Canada or a provincial archivist, at the discretion of the person who held the record. Records held in Archives could be disclosed for research or statistical purposes, provided that the method of disclosure would not identify the young person involved (clause 126). Records held in the RCMP central registry would have to be destroyed at the end of the access period under clause 119 or 120, unless they were required by the National Archivist of Canada.

A recipient of information disclosed under the bill could only make further disclosure of the information where authorized under the bill (clause 129).

H. Part 7: General Provisions

1. Exclusion from Hearing

While it is a general rule, indeed a right, that criminal proceedings should be conducted in public and in the presence of the accused, the criminal law provides for certain exceptions to these requirements. Section 486 of the *Criminal Code* gives courts the power to exclude members of the public in order to maintain order, protect public morals, or for the proper administration of justice, including the protection of child and youth witnesses in certain cases. Moreover, section 650(2) of the *Criminal Code* provides that, notwithstanding the general requirement in section 650(1) that the accused be present during his or her trial, the court may permit the accused to be absent, or have the accused removed, where he or she is disrupting the proceedings or where the accused's mental condition might be adversely affected while his or her mental fitness is under consideration.

In the context of youth criminal justice proceedings, section 39 of the YOA incorporates and expands upon the general power of judges under the *Criminal Code* to exclude persons from criminal proceedings. Clause 132 of the bill would effectively reproduce section 39 of the YOA.

2. Offences and Punishment

a. Overview

Clauses 136 to 139 of the bill would create a series of offences in order to enforce various provisions of the bill and the YOA.

b. Interference with Youth Sentence

Clause 136 would effectively reproduce YOA section 50 and make the following offences punishable on an indictment by up to two years' imprisonment or on summary conviction:

a) inducing or assisting a young person unlawfully to leave a place of custody or other place in which he or she had been placed in accordance with a youth sentence under the bill or a YOA disposition;

b) unlawfully removing a young person from a place described in a);

c) knowingly harbouring or concealing a young person who had unlawfully left a place described in a);

d) wilfully inducing or assisting a young person to breach or disobey a term or condition of a youth sentence or other order of the court, or of a YOA disposition; and

e) wilfully preventing or interfering with the performance of a term or condition of a youth sentence or other order of the court, or of a YOA disposition.

These offences would be under the absolute jurisdiction of the provincial court. In other words, in the prosecution of an adult for such an offence, the summary trial procedure (i.e., trial by judge alone with no preliminary inquiry) would apply, even if the Crown elected to proceed by indictment.

c. Failure to Comply with Youth Sentence

Clause 137 would create a summary conviction offence for young persons who wilfully failed to comply with the terms of their youth sentences or YOA dispositions. This offence would be applicable to a breach of the following sentences: conditional discharge; fine; payment of damages; restitution of property; compensation in lieu of restitution; payment in kind or by way of personal services in lieu of damages or compensation; community service with supervision; prohibition order;[26] probation; intensive support and supervision program; attendance at facility offering program; and an order imposing other conditions. Clause 137 is similar to YOA section 26; however, clause 137 would extend this breach of sentence offence to cover conditional discharges and prohibition orders as well as certain of the new sentences that would be available under clause 42(2) of the bill.

d. Breach of Publication, Records and Information Provisions

Clause 138 would replicate YOA section 46, making it an offence punishable by imprisonment for up to two years on an indictment, or by summary conviction, to violate the various prohibitions in Part 6 of the bill (and under the YOA) with respect to publication, access to, and disclosure of, information relating to proceedings against young persons. As with the offences under clause 136 (see above), offences under clause 138 would be under the absolute jurisdiction of the provincial court.

e. Breach of Pre-Sentencing Detention Provisions

Clause 139(1) would make it an offence punishable on an indictment by up to two years' imprisonment, or on summary conviction: for anyone who wilfully violated the rules in clause 30 regarding pre-sentencing detention of young persons; or for a young person or a "responsible person" who wilfully failed to comply with an undertaking under clause 31(3) (placement with responsible person as alternative to pre-sentencing detention). Violation of the

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(26) This new offence would, however, apply only to a breach of prohibition order imposed under the future YCJA (clause 42(2)(j)). In the case of a prohibition order imposed under section 20(1)(h) of the YOA, the legislation which provides for the particular prohibition in question would remain the basis for a charge of breaching the order.

corresponding YOA provisions (sections 7 and 7.1(2)) would be prohibited under clause 139(2), but only as a summary conviction offence; this is consistent with YOA section 7.2.

f. Use of Prohibited Employment Application Form

Clause 139(3) would maintain the offence, currently found in YOA section 36(4), of using, or authorizing the use, contrary to clause 82(3), of an employment application form in the federal public sector, or a federally regulated business, that requires the disclosure of a finding of guilt under the future YCJA or the YOA where the sentence or disposition has been completed.

3. Application of the *Criminal Code*

a. General Applicability of *Criminal Code* Provisions

Like YOA section 51, clause 140 would provide that, except as inconsistent with the bill, the provisions of the *Criminal Code* would apply with respect to offences alleged against young persons, with any necessary modifications.

b. Mental Disorder

Clause 141 would effectively re-enact YOA section 13.2 with respect to the application of the *Criminal Code* provisions on mental disorder. Section 16 of the Code provides for a defence of mental disorder, while Part XX.1 deals with mental assessment procedures and dispositions for persons found unfit to stand trial or not criminally responsible by reason of mental disorder.

Clause 141 would provide for the general application of those provisions, though it would adapt certain of them to the particular circumstances of young persons. For instance, clause 141(2) would provide that any requirements in Part XX.1 (Mental Disorder) of the *Criminal Code* for the giving of notices would be read as also requiring copies of such notices to go to a young person's counsel and parents. Clause 141(6) would provide that, before making a disposition in respect of a young person under Part XX.1, a youth justice court or Review Board would have to consider his or her age and special needs and any representations by a parent. Section 672.64 of the *Criminal Code* provides for the capping of dispositions under Part XX.1 to

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ensure that persons found unfit to stand trial or not criminally responsible on account of mental disorder are not subject to lengthier restrictions on their liberty than persons who are actually convicted of the offence. Clause 141(7) would adjust these caps to the maximum length of the youth sentence to which the young person would be subject if found guilty of the offence. Clauses 141(8) and (9) provide for the increase of that youth cap, however, on the application of the Attorney General, where a young person was found unfit to stand trial for a presumptive offence, or for an offence where notice had been given of an intention to seek an adult sentence. Where a young person was found unfit to stand trial, a *prima facie* case in respect of the offence charged would have to be made against him or her every year, rather than every two years, in order for the court to retain jurisdiction to try the young person, should he or she become fit (clause 141(10)). Finally, clause 141(11) would provide that references in Part XX.1 of the *Criminal Code* to hospitals would have to be construed as references to hospitals designated by the provincial Minister of Health for the custody, treatment, or assessment of young persons.

c. Summary Conviction Procedures

Clause 142 would, similar to YOA section 52, provide that the *Criminal Code* provisions on summary conviction proceedings (Part XXVII) would apply to proceedings under the bill, whether in respect of summary conviction offences or indictable offences, except where this would be inconsistent with any other provision of the bill (for example, where the young person faced an adult sentence or was being tried for murder, the bill provides for an election of mode of trial, as in an adult case prosecuted by indictment). However, clause 142(3) would provide that the requirement under section 650 of the *Criminal Code*, that persons charged with an indictable offence be present throughout the proceedings (and not just appear through counsel or an agent, as is permitted in summary conviction proceedings) would apply in all youth justice cases, regardless of the offence. Moreover, clause 142(4) stipulates that, notwithstanding the general applicability of the *Criminal Code* summary conviction provisions, the general six-month limitation period for the prosecution of summary conviction offences in section 786(2) of the *Criminal Code* would not apply in indictable youth cases.

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4. Evidence

a. Admissibility of Statements

i. Statements to Persons in Authority

Clause 146(1) would, like YOA section 56(1), provide that the general law on the admissibility of statements by accused persons would apply with respect to young persons. Basically, the common law requires that, while a statement made by a suspect to a person in authority, such as a police officer, may be used in evidence against that suspect, the prosecution must first establish that the statement was voluntary; that is, that the statement was made without fear of prejudice or hope of advantage, and was the product of an "operating mind" capable of understanding what was being said and appreciating the consequences of the statement.

However, clause 146(2), which is similar to YOA section 56(2), would go beyond the common law to both codify and enhance the protection available to young persons in this area. The clause would, however, clarify that these special protections would apply only to young persons who were under 18 at the time of the statement; they are not intended for the benefit of adults who might happen to be subject to the youth justice legislation because of their age at the time of the offence.

First of all, under clause 146(2)(a), the statement by the young person would have to have been voluntary as required by the common law.

Second, pursuant to clause 146(2)(b), the peace officer or other person in authority to whom the statement was made would first have to clearly explain to the young person, in language appropriate to his or her age and understanding, that:

- the young person was under no obligation to make a statement;
- any statement made by the young person could be used in evidence against him or her;
- the young person had the right to consult with counsel and a parent or other appropriate adult chosen by the young person; and
- unless the young person desired otherwise, any statement he or she made would have to be made in the presence of counsel and/or the parent or other adult consulted by the young person before making the statement.

Third, before the statement was made, the young person would have to be given a reasonable opportunity to consult with counsel and with a parent or other appropriate adult (clause 146(2)(c)).

Finally, a young person who consulted with counsel and/or a parent or other adult would have to be given a reasonable opportunity to make the statement in the presence of the person or persons so consulted (clause 146(2)(d)).

However, like YOA section 56(3), clause 146(3) would provide that the foregoing requirements under clause 146(2)(b), (c), and (d) would not apply where the young person made a spontaneous statement to a peace officer or other person in authority before there was a reasonable opportunity to comply with those requirements.

A new provision, clause 146(6), would provide that a "technical irregularity" in complying with the requirements in clause 146(2)(b), (c), and (d) would not necessarily render a young person's statement inadmissible where the court was satisfied that the admission of the statement would not "bring into disrepute" the principle that young persons are entitled to enhanced procedural protection to ensure fair treatment and the protection of their rights. This test is borrowed from the test for the admissibility of evidence obtained through a breach of the *Canadian Charter of Rights and Freedoms* (see section 24(2)). Providing judicial discretion to admit statements obtained in violation of the requirements set out in clause 145(2)(b) through (d) is intended to prevent the loss of otherwise legal evidence through technical or minor violations of these procedures; this is in accordance with a recommendation of the House of Common Standing Committee on Justice and Legal Affairs.[27]

Like adults, young persons can waive their right to consult counsel before making a statement to police. They can also waive their unique right to consult with a parent or other appropriate adult and to make their statement in the presence of any such persons consulted. For the waiver of such rights to be effective, however, YOA section 56(4) requires that the waiver be videotaped, or be in writing and contain a statement signed by the young person that he or she has been informed of the right being waived. Clause 146(4) of the bill would maintain the YOA section 56(4) procedure for waiver of these rights, but would add the option of audiotaping. A new provision, clause 146(5), would, however, permit courts to admit statements obtained

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(27) *Renewing Youth Justice*, p. 71 (recommendation 14).

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without following the waiver procedure specified in clause 146(4), provided they were satisfied that the young persons had been informed of their rights and had, in fact, waived them.

Clause 146(7) would, like YOA section 56(5), provide that a youth justice court could rule a statement inadmissible where the young person satisfied the court that it had been made under duress applied by someone other than a person in authority.

Clause 146(8) would, like YOA section 56(5.1), prevent a young person from benefiting from a violation of the special procedures described above where the young person had induced the violation by misrepresenting himself or herself to be an adult. However, the person in authority to whom the statement or waiver was made would have to have made reasonable inquiries as to the young person's age and have had reasonable grounds for believing that he or she was 18 or older. Moreover, the statement or waiver would, in all other circumstances, have to be admissible (i.e., it would have to comply with the legal requirements applicable to such statements or waivers generally under the common law and the Charter).

Under clause 146(9), a person consulted by a young person under clause 146(2)(c) would be deemed not to be a person in authority in the absence of evidence to the contrary. In other words, provided that they did not amount to duress (see clause 145(7) above), threats or inducements coming from the young person's counsel, parent or other chosen adult would generally not render the young person's statement or confession involuntary under the law.

ii. Statements during Pre-Sentence Assessments

Clause 147 would reproduce YOA section 13.1 on the use of statements made by young persons during the course of pre-sentence assessments ordered under clause 34. Clause 147(1) would provide for the general inadmissibility of such statements in proceedings without the consent of the young person. Clause 147(2), however, would provide that such statements could be admitted into evidence for certain specific purposes, such as determining mental fitness; determining whether the young person had been suffering from a mental disorder at the time of the offence; dealing with subsequent inconsistent testimony by the young person by challenging his or her credibility, or by establishing perjury; or in making certain decisions relating to the young person's conditional release from custody (i.e., conditional supervision).

b. Establishing the Age of the Accused

Establishing the age of an accused person is particularly important in youth justice proceedings because it directly affects the application of the youth justice legislation and the jurisdiction of the youth justice courts. Thus, clause 148 would, like YOA section 57, provide particular rules for establishing the age of a person, such as the use of parents' testimony, certain records, and any inferences that the court is able to draw from the person's appearance or statements made in giving evidence.

5. Creation and Funding of Programs

Clauses 156 and 157 of the bill would provide for arrangements between different levels of government for the funding and establishment of programs and services to be provided under the bill.

Clause 156 would effectively re-enact YOA section 70 which provides for payments by the federal government to provinces or municipalities for costs incurred in the provision of services to young persons dealt with under the bill. Such payments could be made pursuant to an inter-governmental agreement entered into by any federal minister with the approval of the Governor in Council.

Clause 157 would provide that the Attorney General of Canada or a minister designated by the provincial government could establish the following types of community-based programs:

- alternatives to judicial proceedings, such as victim-offender reconciliation, mediation and restitution programs;
- alternatives to pre-sentencing detention, such as bail supervision programs; and
- alternatives to custody, such as intensive support and supervision programs (see clause 42(2)(l)), and programs in respect of which attendance orders (see clause 42(2)(m)) could be made.

6. Miscellaneous

Clauses 130 and 131 would provide for the disqualification of youth justice court judges from sitting in certain cases, and for the substitution of youth justice court judges where

the original judge was unable to continue with the case. These provisions would replicate YOA sections 15 and 64.

Clause 133 would reproduce YOA section 18 providing for the transfer of charges between provinces.

Clauses 134 and 135 would reproduce YOA sections 48 and 49 on the forfeiture of recognizances in youth justice court cases.

Clauses 143 to 145 would provide for the application of special rules for process issued in the youth justice court: summary conviction and indictable offences could be charged in the same information and tried jointly; and youth justice court subpoenas and warrants would be effective throughout Canada. The same provisions are found in YOA sections 53 to 55.

Clauses 149 to 153 would essentially reproduce the provisions in YOA sections 58 to 63 concerning various evidentiary matters of a procedural or technical nature.

Clauses 154 and 155 would effectively re-enact YOA sections 66 and 67 to provide for the prescription of forms for youth justice court proceedings and for the making of regulations by the Governor in Council for prescribing forms, establishing uniform rules of court, and, generally, for carrying out the purposes of the bill.

COMMENTARY

This bill, as was the case with the *Young Offenders Act*, has been the object of widely divergent opinion. One of the goals of this legislative initiative was to restore confidence in the youth criminal justice system by repealing and replacing, it in its entirety, the present law, which has been largely discredited in the eyes of many opinion-makers.

Sharp criticism of the bill comes both from those who find it is too punitive, and those who believe it is not tough enough in dealing with cases of serious youth offending. There is also a body of opinion that supports the bill because it contains new elements that are considered an improvement on the present legislation.

Those who believe the bill is too punitive argue that it focuses on the offence committed by the young person, to the exclusion of the context in which the offending took place. They argue that the bill adopts "protection of the public" as its primary guiding principle at the expense of the rehabilitation and reintegration of young offenders. It is also suggested that

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the bill would introduce many elements of the adult criminal justice system into the youth criminal justice system, to the detriment of the young offenders to be processed by it.

Those who believe the bill is not tough enough argue that the penalties available for the most serious cases of youth offending are not sufficient and that such cases should be automatically processed through the adult criminal justice system. It is suggested that deterrence and denunciation of youth criminal offending are not given sufficient importance in the bill.

According to some critics, the minimum age for youth criminal justice system processing should be reduced in some circumstances to age 10, in order to deal with youth offending where education, mental health, and child welfare/protection approaches are inadequate. Some propose that the upper age for youth criminal justice processing should be set at 16, with adult consequences for adult offending.

Many of those who support the bill like many of the new elements that it would add to the youth criminal justice system. They argue that the statements of philosophy set out in different parts of the bill provide guidance to those who would have to implement, and be subject to, this legislation. They suggest that the extrajudicial measures, conferencing, and youth justice committee measures in the bill would provide opportunities for early intervention outside of the youth justice system to address youth offending. They also argue that many of the sentencing and other options proposed should reduce the now too-high rate of youth incarceration.

Many commentators from Quebec have claimed that that province has adopted a unique, integrated, diversion-based approach to implementing the *Young Offenders Act* which has resulted in fewer young people being processed by the courts and incarcerated. It is said that this legislation works well, rendering Bill C-7 unnecessary. Other jurisdictions are urged to adopt an approach to youth offending similar to that of Quebec.

Many commentators have said that legislative change is only part of an effective strategy to renew youth justice. It must be accompanied by a commitment to ensuring an adequate level of resources and the development of appropriate facilities and programs to implement it effectively.

Some have suggested that most, if not all, of the new elements in the bill could have been put into place by a moderate number of amendments to the present legislation.

Many have complained about the length and complexity of the bill. They argue that those who have to implement the bill will require much training and that it will be difficult to educate the public and young people about its content. They suggest that the *Young Offenders Act* is a model of brevity and clarity by comparison.